STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JON R. SCHNELLE, Complainant,

vs.

DEPARTMENT OF WORKFORCE DEVELOPMENT,
Division of Unemployment Insurance, Respondent.

Case 807
No. 68475
PP(S)-393

Decision No. 32689-B

Appearances:

Peter Nowicki, President, AFSCME Local 145, 107 North Blair Street, Apartment No. 3, Madison, Wisconsin, 53703, appearing on behalf of Jon R. Schnelle.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Department of Workforce Development, Division of Unemployment Insurance.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DISMISSING COMPLAINT

On December 10, 2008, AFSCME Local 145 filed a complaint with the Wisconsin Employment Relations Commission alleging that Department of Workforce Development, Division of Unemployment Insurance (DWD) had committed unfair labor practices within the meaning of Secs. 111.84(1)(a),(b) and (c) and (2)(a), Stats., by terminating Jon Schnelle. On January 9, 2009, the complaint was amended to make Jon Schnelle the sole named complainant.

On Match 16, 2009, DWD filed an answer denying that it had committed any of the alleged unfair labor practices.

Hearing on the complaint was held on March 24, 2009 before Commission Examiner Michael R. O'Callaghan. During the hearing, Schnelle withdrew the complaint allegation that

DWD had violated Sec. 111.84(2)(a), Stats. The parties thereafter filed briefs-the last of which was received June 15, 2009.

Examiner Peter G. Davis has been substituted for Examiner O'Callaghan. Prior to issuing this decision, Examiner Davis consulted with Examiner O'Callaghan to receive his impressions of the witnesses' demeanor during the hearing.

Having reviewed the record, I make and issue the following

FINDINGS OF FACT

1. The Department of Workforce Development, herein DWD, is an agency of the State of Wisconsin that employs individuals to perform services for the citizens of Wisconsin. Within DWD, there is a Division of Unemployment Insurance where some DWD employees work.

2. Jon R. Schnelle, herein Schnelle, was hired by DWD as an Employment Security Assistant 3 in the Division of Unemployment Insurance and started work on May 19, 2008 subject to a six month probationary period. He was represented for the purposes of collective bargaining by AFSCME Local 145.

3. During Schnelle's orientation to his new job, DWD supervisor Brueggeman reviewed work rules and policies-including DWD's policy regarding limitations on personal use of the internet during the work day. Said internet policy restricts personal use of the internet to 30 minutes per day during the employee's lunch break with additional use subject to supervisory approval.

4. In June, 2009, the day before the June meeting of Local 145, Schnelle approached his supervisor, Hendrickson, and sought and received time off during the work day to attend the meeting. When granting Schnelle's request, Hendrickson advised Schnelle that he needed to provide more notice so that appropriate arrangements could be made for Schnelle to make up the lost work time. Thereafter, Schnelle did so and sought and received permission to attend the July, August, September and October meetings of Local 145.

5. In August, 2008, Schnelle was nominated to serve as Local 145 vice-president. DWD was unaware of this nomination.

6. On September 10, 2008, Schnelle received a positive evaluation for the work period of June 16-August 15, 2008.

7. On or about September 19, 2008, Schnelle was elected as Local 145 vice-president. DWD was unaware of this election until October 23, 2008.

8. On September 29, 2008, supervisor Hendrickson was advised by Schnelle's lead worker Murphy that Schnelle was using the internet for personal use during work time. Later that day, when discussing errors that Schnelle was making, Hendrickson told Schnelle that he was to devote his full attention to his work and not to be doing puzzles, looking at magazines or using the internet. This was the first time Hendrickson had become aware of any issue as to Schnelle's personal use of the internet during work time. Late that same day, Murphy advised Hendrickson that Schnelle was again using the internet for personal purposes during work time.

9. On October 13, 2008, supervisor Hendrickson observed Schnelle using the internet for personal purposes during work time. Hendrickson directed Schnelle to end the personal internet usage.

10. On October 14 and 15, 2008, Schnelle's lead worker Murphy again advised supervisor Hendrickson that Schnelle was using the internet for personal purposes during work time. On October 15, 2008, in response to a complaint from Schnelle that a phone caller he was working with would not listen to his instructions, supervisor Hendrickson told Schnelle that the caller was no different than Schnelle who was not following Hendrickson's direction not to use the internet for personal purposes during work time.

11. On or about October 16, 2008, Schnelle was sworn in as Local 145 vice-president. DWD was unaware of Schnelle's vice-presidency until October 23, 2008.

12. On Friday October 17, 2008, supervisor Hendrickson was absent from work. On that date, Schnelle's lead worker Murphy advised supervisor Brueggeman that Schnelle was using the internet for personal purposes during work time. On Monday October 20, 2008, Brueggeman and Hendrickson discussed their concerns over Schnelle's continued internet use in the face of Hendrickson's warnings and Brueggeman launched an investigation into the level of Schnelle's internet use.

On October 21, 2008, Brueggeman received the following memo from Human Resources Specialist French as to the results of the investigation.

> I have reviewed the internet logs for Jon Schnelle. Jon averages 4 hours of browse time each day. His time has not changed since August 11, 2008, the start of the log. I noted that Jon is a part time employee who is also a student at UW. Jon logs on to his email account there. Jon also spends a considerable amount of time browsing shopping sites, music (rock bands), Facebook and sports sites. There was no work related activity.
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> I think that most of the recorded time reflects actual browsing. I don't see how he can do the kinds of browsing he does and be a productive worker.

13. On October 23, 2008, Brueggeman conducted a probationary status review with Schnelle whose six month probationary period would end November 18, 2008. Following the meeting, Brueggeman summarized the content of the meeting and recommended Schnelle's termination in the following October 23, 2008 memo:

Date: October 23, 2008

To: Terry Breber & DWD HR

From: Bill Brueggeman

Subject: **Jon Schnelle, Internet Use and Probationary Status**

Today I held a probationary status review meeting with Jon Schnelle. Present at the review were Jon, Steve Hendrickson, Jon's supervisor, and myself. Jon was hired as an ESA-3 Claims Specialist on 5/19/08 and his probation ends 11/18/08.

Discussed during the meeting were managements concerns regarding Jon's ongoing violation of DWD policy and work rules. Specifically, Jon was informed of the following violations:

- Work Rule A1. regarding insubordination
- Work Rule A2. Neglecting job duties and engaging in unauthorized personal activities during work time.
- DWD Policy 516 C.1.a. Personal Use of DWD IT Resources

Jon was informed that due to continued reports of internet use during work time we had requested a log of his internet usage. We shared with Jon that these logs indicated that between 8/11/08 and 10/20/08, he had logged 199:42 hours of internet browsing, averaging four hours a day, with some days as high as six and a half hours.

We reminded Jon that he should have been fully aware that this was a violation of DWD policy and work rules based on prior notification and discussions.

On the first day of employment at the Madison Benefit Center each employee is given a copy of the work rules and IT policy. I personally read the policy to them and answer (sic) any questions they may have.

On 5/19/08 Jon was part of our PC training where appropriate use of the internet is once again part of the discussion.

On 9/16/08 Jon attended an "All Staff" meeting at the Benefit Center where the UI Security Officer, Terry Breber, gave a talk about appropriate personal use of the internet.

On 9/29/08, Steve Hendrickson, Jon's supervisor had a one on one meeting with him to discuss his use of .the internet during work time and while on the phone with customers. Jon was told by his supervisor at that time that he needed to correct this behavior immediately or it could effect (sic) the decision to pass probation and his continuing employment.

On 10/13/08 Jon's supervisor observed him on E-BAY while on the phone with a customer and was told to shut it down. Then once again his supervisor told Jon this was unacceptable internet use.

The logs show these discussions and notice of the policy and work rules had no impact on the amount of time Jon was spending browsing the internet. The use actually increased at certain points, with the week of 10/13/08 through 10/17/08 being one of the highest in the amount of usage.

During the review Jon was asked if would like to comment on the information that I had relayed to him in an effort to help us understand his behavior. Jon commented that he liked his job, and was trying to get involved in the organization by volunteering for new things. He was recently elected as vice-president of the local union. He stated that he believed he was doing a good job and was performing his duties satisfactorily. He mentioned that his supervisor during his recent mid-probation review said his productivity and accuracy of claims taking was right where it needed to be at this point in his probation. He also mentioned that he receives comments about his customer service from customers. He stated that he believed he was not browsing the internet as much as the logs reflected and that he was trying to limit his internet usage to times during his lunch.

Although Jon may not have significant issues related to his work, I believe there are aspects of his job that are not easily measured. Claims specialists are responsible for relaying specific instruction to the claimants about there (sic) rights and responsibilities regarding their claim. The (sic) also answer complex questions that can effect (sic) the claimants (sic) initial and continuing eligibility. These tasks require the full attention of the specialist and distractions can lead to missed information or not communicating information that could result in benefits being denied or overpaid. Sometimes these issues will not show up until much later.

Based on the information above I believe that Jon could not have been giving his full attention to the job and customer. Jon's refusal to correct his behavior after

> it was brought to his attention shows a blatant disregard for DWD policy, work rules, the customer and management. His refusal to recognize the importance and take responsibility for his behavior leads me to believe that this issue and any future concerns could hinder his ability to perform the job in the future at the level we expect.
>
> Therefore, I am recommending that Jon be terminated from his probationary employment as a Claim Specialist at the Madison UI Benefit Center

Brueggeman's recommendation was approved on October 31, 2008 and Schnelle was given the following letter and terminated on November 6, 2008:

> Dear Mr. Schnelle:
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> This letter is to inform you that you are terminated from your probationary employment with DWD as of the close of business on Thursday, November 6, 2008.
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> The reasons for this termination are your failure to adhere to the DWD policy regarding use of the internet for personal reasons during work time. You were made aware of the DWD policy, and your ongoing violation of that policy during your probation, but you failed to correct your behavior.
>
> Thank you for the work you performed while in the position.

14. Sometime after October 31 but before November 6, 2008, Schnelle requested time off from work to attend AFSCME training on November 12 and 13, 2008.

15. Schnelle's termination was not based in whole or in part on any hostility toward his protected concerted activity.

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

CONCLUSION OF LAW

By terminating Jon Schnelle, the Department of Workforce Development, Division of Unemployment Insurance did not commit unfair labor practices within the meaning of Secs. 111.84(1) (a)(b) or (c), Stats.

Based on the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 3rd day of September, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/
Peter G. Davis, Examiner

DEPARTMENT OF WORKFORCE DEVELOPMENT,
Division of Unemployment Insurance (Schnelle)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER DISMISSING COMPLAINT

Schnelle alleges that DWD fired him based on hostility toward his attendance at AFSCME Local 145 union meetings during work time, his election as vice-president of AFSCME Local 145 and his request to miss two days of work for union training. DWD asserts Schnelle was fired exclusively because of his personal use of the internet during work time.

If DWD fired Schnelle based in whole or in part out of hostility toward his activities on behalf of AFSCME Local 145, DWD thereby committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c) of the State Employment Labor Relations Act (SELRA). STATE V WERC, 122 Wis. 2d 132, 144 (1985). However, as the Court stated at 142:

> A violation of SELRA is not established by merely proving the presence of protected concerted activity. The employee must show that the employer was motivated, at least in part, by anti-union hostility. Therefore, proof that the employee was discharged for legitimate reasons is relevant in determining the employer's motive.

The Court went on to explain at 143:

> As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate 'just cause' for its action. However, to the extent that [the employer] can establish reasons for its actions which do not relate to hostility towards an employe's protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw.

Consistent with the foregoing,

> . . . it should be made clear that that the mere presence of protected concerted activity does not automatically yield a conclusion that the employer is hostile thereto. While it may be true that if given a choice, employers generally would prefer the absence of a union or the absence of employes who engage in protected concerted activity, such a generality does not meet Complainant's

> burden of proof as to Respondent's hostility . . . . In the same vein, it must be noted that participation in protected concerted activity does not immunize an employe for adverse employment consequences if that employe engages in conduct which warrants discipline and if discipline is unrelated to the protected activity.
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> STATE OF WISCONSIN, DEC. NO. 18397-A (Davis, 4/82) at 9; aff'd by operation of law (WERC, 5/82); aff'd STATE V. WERC, *supra*.

Applying all of the foregoing to the evidence in this case, I conclude that DWD fired Schnelle solely because of his continued personal use of the internet during work time. Thus, I further conclude that DWD did not thereby commit unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c) of SELRA.

Schnelle correctly argues that because DWD knew he was engaged in protected concerted activity on behalf of Local 145, there is an inference that he was fired at least in part because of that activity. In this regard, Schnelle appropriately points to DWD's knowledge of his attendance at union meetings beginning in August 2008 and of his status as Local 145 vice-president several hours prior to the Brueggeman's October 23, 2008 termination recommendation and several days prior to the date of his termination. [1]

Schnelle also presented evidence hoping to establish general hostility by DWD, Division of Unemployment Insurance, toward protected concerted activity and specific hostility toward such activity by Schnelle. I do not find that evidence particularly persuasive-especially as to any hostility toward Schnelle's personal activity. [2] However, I need not and do not make any formal determination as to DWD hostility because, by a large margin, the record as a whole satisfies me that any hostility toward his protected concerted activity had nothing to do with his termination. In this regard, the evidence establishes that: (1) Schnelle was a probationary employee as to whom DWD did not need to meet a "just case" standard to terminate his employment during his probationary period; (2) Schnelle spent substantial portions of his work day browsing the internet for personal purposes; (3) Schnelle knew or should have known from several conversations with his supervisor that his employer wanted him to end his browsing but he did not do so; and (4) DWD's knowledge of, concern about,

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[1] Schnelle also points to his request to attend two days of union training to be held November 12 and 13, 2008. However, because the evidence satisfies me that this request came after Brueggeman had effectively recommended Schnelle's termination and after that recommendation had been approved by those who had no knowledge of this request, I reject this element of Schnelle's protected concerted activity as having any relevance to my analysis.

[2] Schnelle testified that supervisor Hendrickson was upset when he requested time off to attend the June 2008 Local 145 union meeting. I'm satisfied from the record as a whole that any hostility expressed by Hendrickson during that conversation was based on the timing of Schnelle's request-the meeting was the next day and arrangements needed to be made to reschedule Schnelle's work. It is also noteworthy that Hendrickson's generally positive September 10, 2008 evaluation of Schnelle's work came after this June conversation and that Schnelle's requests to attend Local 145 meetings in July, August, September and October 2008 were all approved.

and specific investigation into his internet browsing was prompted by complaints from a co-worker that pre-dated any knowledge by DWD of his protected concerted activity beyond his attendance at Local 145 union meetings.

In reaching my conclusions, I have considered but rejected Schnelle's assertion that his termination must have been motivated by his protected concerted activity because other employees had comparable levels of personal internet use but were not terminated. While Schnelle is factually correct as to the internet usage of other employees and the resultant level of discipline, DWD correctly points out that the other employees had "just cause" protection and Schnelle did not. Thus, while DWD might well conclude that the "just cause" standard required that they use progressive discipline such a written warning to address improper internet use, DWD had no obligation to do so as to Schnelle. In effect, DWD could permissibly hold Schnelle to a higher standard than other non-probationary employees during his probationary period and terminate his employment if they concluded that he was not likely to be a satisfactory long term "just cause" protected employee. Thus, in the context of his probationary status, even assuming, as Schnelle argues, that DWD did not explicitly warn him prior to October 23, 2008 that his job was in jeopardy due to his internet use, they had no obligation to do so. Based on Schnelle's ongoing internet use despite negative comments from his supervisor, I'm satisfied DWD permissibly concluded that Schnelle did not have the makings of a solid "just cause" protected employee and that his employment should be terminated during the probationary period before the "just cause" protections attached.

In reaching this conclusion, I have also considered but rejected Schnelle's assertion that his overall work was satisfactory, that DWD thus had no business need to fire him, and therefore that hostility toward his union activities must be the motivating factor. Schnelle's argument can be viewed as an assertion that an employee is free to ignore the employer's instructions/work rules as to how to use work time as long as a satisfactory amount of work gets done. Such an argument has no support in the real world of the work place. Employees, particularly probationary employees, ignore their supervisor's instructions/the employer's reasonable work rules at their peril. Had Schnelle heeded the September 29 or October 13 or 15, 2008 conversations with his supervisor regarding internet use, its likely he'd still be employed. That he failed to do so reflects a lack of understanding of the workplace and of his probationary status. Thus, even though Schnelle's work output level may have been satisfactory, DWD permissibly could conclude that Schnelle nonetheless did not have the makings of solid "just cause" employee because he failed to follow supervisory instruction/reasonable work rules.

Schnelle also argues that his termination in the context of his status as vice-president of Local 145 violated Secs. 111.84(1)(b), Stats. which in pertinent part prohibits conduct that would " . . .interfere with the. . . administration of any labor . . . organization . . ."

While it is literally true that firing a union vice-president no doubt causes some internal difficulties for the union, this statutory provision cannot reasonably be interpreted as having been violated where, as here, the employer's action was not illegally motivated. Thus, no violation is found.

Given all of the foregoing, I have dismissed the complaint.

Dated at Madison, Wisconsin, this 3rd day of September, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/
Peter G. Davis, Examiner

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