

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

-----  
SYLVESTER LEE HARRIS,

Complainant,

vs.

RACINE POLICEMEN'S PROFESSIONAL  
AND BENEVOLENT CORPORATION,

Respondent.  
-----

Case I

No. 16541 MP-218

Decision No. 12637

Appearances:

Schoone, McManus, Hanson & Grady, S.C., Attorneys at Law, by Mr. Martin I. Hanson, appearing on behalf of the Complainant.

Mr. Gerald P. Boyle, Attorney at Law, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission in the above entitled matter; and the Commission having appointed George R. Fleischli, a member of the Commission's staff, to act as Examiner and make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held at Racine, Wisconsin on May 15, 1973 before the Examiner; and the Examiner having considered the evidence and arguments and being fully advised in the premises makes and files the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. That the Complainant, Sylvester Lee Harris, hereinafter referred to as the Complainant or Harris, is an individual residing at 3706 Douglas Avenue, Racine, Wisconsin, employed by the City of Racine in its Police Department and was at all times material herein a municipal employee within the meaning of Section 111.70(1)(b) of the Municipal Employment Relations Act.

2. That the Respondent, Racine Policemen's Professional and Benevolent Corporation, hereinafter referred to as the Respondent, is a labor organization within the meaning of Section 111.70(1)(j) of the Municipal Employment Relations Act and is the voluntarily recognized bargaining agent for law enforcement personnel employed by the City of Racine in its Police Department including employees holding the rank of Patrolman and Sergeant.

3. That prior to November 27, 1972, the Complainant was a Patrolman and Director of the Community Relations Division of the Racine Police Department; that sometime after August 16, 1972 and prior to October 2, 1972 the Complainant was interviewed by the Racine Star Times, a weekly newspaper published in Racine and read predominately in the Black community, which interview resulted in an article in which the Complainant was quoted as follows:

No. 12637

## **"The role of a Black cop**

The role of today's Black policemen is that of roughness and perserverance (sic). Today's Black policemen face social, economical, and emotional problems.

'Everyone wants to be liked, says Sylvester Harris, community relations specialist for the Racine Police Dept. Better known as 'Syl' Harris feels that his job is to get the community involved. He explains that his job takes him into schools (placing special emphasis on the drug problem) and as a mediator in neighbor conflicts.

Harris, born in Marion, Illinois, has been in Racine for 21 years. He came to Racine, like many others, in hope of economical survival. Harris says he (sic) 'never had a desire to be a patrolman until an earlier experience involving himself in a traffic violation which prompted 15 policemen to beat him.

The bureau, started under the administration of Mayor Beyer, at which time Harris was the only member under the directorship of Captain Dodge, recently named police chief of the Racine police dept.

'Up until now,' says Harris, 'the bureau has not received the support of the police administration' He conveys a feelings (sic) of negativeness, towards himself, leader of the bureau, and towards the bureau itself. 'If the department weren't here minorities would have no sources for recovery,' Harris says.

Harris says because of systematic exclusion, Blacks feel that there is no answer for them through the law. 'When we call a Black policemen a yes man, we're really saying that we want him to be a yes man for us Blacks' He stresses the need for equal enforcement across the table for all Racine citizens. He adds that a system that would place Black patrolmen (sic) in a minority community would defeat what we have been fighting for over 200 years. 'We shouldn't return to a society that we has been divided for over 200 years,' he says. Harris expresses a need for more Blacks on the force who can explain and relate to the Black plight.

'Blacks have different types of problems and they also need protection,' Harris explains.

Harris, an active member of the Concerned Citizens On Crime headed by Ms. Corrine Owens, feels that both Black and White animosities and their inability to accept the Black policeman, is the cause of many problems that the Black patrolmen face.

Personal racism is marked as the number one problem within the law enforcement agency itself. Harris expresses an air of anti-Harris in the police department.

He says it's hard to be accepted, and goes on further to say he has least to accept it and remain dedicated to the task at hand."

4. That shortly after the above quoted article appeared in the Racine Star Times, Donald J. Dodge, Police Chief for the City of Racine, had a discussion with the Complainant wherein Dodge verbally reprimanded the Complainant for having violated an alleged departmental rule or order which prohibited police officers from granting interviews to the press without the prior approval of the Chief; that thereafter, on October 2, 1972 the Respondent's Board of Directors held a meeting

for the purpose of discussing said article and asked Chief Dodge to attend their meeting; that at said meeting, the Respondent reminded Chief Dodge that Harris had violated the alleged departmental rule or order by granting the interview which was the basis of said article; that during this discussion, members of the Respondent's Board of Directors asked Chief Dodge what action, if any, he intended to take against Harris, and Chief Dodge advised them that he had already talked to Harris and verbally reprimanded him for violating the alleged departmental rule or order; that further discussion took place regarding the accuracy and propriety of Harris' comments as quoted in said article, wherein a number of members of the Respondent's Board of Directors advised Chief Dodge that the article had upset a number of men in the department; that before the discussion terminated, several members of the Respondent's Board of Directors told Chief Dodge that Harris should be "put back in a blue uniform" and reassigned to the third shift which begins at 11:00 p.m. and ends at 7:00 a.m.; that if Harris were reassigned to the third shift under the conditions suggested by the Respondent's Board of Directors, he would have been unable to carry out his normal duties as Director of the Community Relations Division of the Racine Police Department; that assignment to the third shift is normally based on low seniority within the employee's division, unless it would result in having too many inexperienced patrolmen assigned to that shift; that reassignment to the third shift under the circumstances suggested by the Respondent's Board of Directors would have adversely affected the employment status of Harris and would have been disciplinary in nature.

5. That prior to the meeting on October 2, 1972, Harris had been certified as eligible for promotion, along with two other applicants, to the rank of Sergeant in accordance with the promotional policies of the Racine Police Department; that because he was aware that the contents of the above described article had caused bad feelings towards Harris on the part of a number of police officers in the Department and because he was aware that efforts were under way to attempt to placate those bad feelings, Chief Dodge asked the Police and Fire Commission to defer consideration of his recommendations for promotion from the list in question until its next meeting; that at a subsequent meeting of the Police and Fire Commission occurring on November 27, Chief Dodge recommended Harris for promotion to Sergeant and his recommendation was approved; that Chief Dodge's decision to ask the Police and Fire Commission to defer action on his recommendations for promotion to Sergeant was based solely on his concern for the morale problems extant in the Police Department at that time and not because of any action of the Respondent, its officers or agents; that Chief Dodge did not take any action on the request of the Respondent's Board of Directors that Harris be "put back in a blue uniform" and reassigned to the third shift.

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

#### CONCLUSION OF LAW

That the Racine Policemen's Professional and Benevolent Corporation, by the actions of its Board of Directors in asking Chief Dodge to "put [Harris] back in a blue uniform" and reassign him to the third shift, without regard to Sylvester Lee Harris' rights in the matter, failed to fairly represent and consequently coerced and intimidated an employee in the enjoyment of his legal rights and has committed prohibited practices within the meaning of Section 111.70(3)(b)3 and Section 111.70(3)(b)1 of the Municipal Employment Relations Act.

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



for the purpose of discussing said article and asked Chief Dodge to attend their meeting; that at said meeting, the Respondent reminded Chief Dodge that Harris had violated the alleged departmental rule or order by granting the interview which was the basis of said article; that during this discussion, members of the Respondent's Board of Directors asked Chief Dodge what action, if any, he intended to take against Harris, and Chief Dodge advised them that he had already talked to Harris and verbally reprimanded him for violating the alleged departmental rule or order; that further discussion took place regarding the accuracy and propriety of Harris' comments as quoted in said article, wherein a number of members of the Respondent's Board of Directors advised Chief Dodge that the article had upset a number of men in the department; that before the discussion terminated, several members of the Respondent's Board of Directors told Chief Dodge that Harris should be "put back in a blue uniform" and reassigned to the third shift which begins at 11:00 p.m. and ends at 7:00 a.m.; that if Harris were reassigned to the third shift under the conditions suggested by the Respondent's Board of Directors, he would have been unable to carry out his normal duties as Director of the Community Relations Division of the Racine Police Department; that assignment to the third shift is normally based on low seniority within the employee's division, unless it would result in having too many inexperienced patrolmen assigned to that shift; that reassignment to the third shift under the circumstances suggested by the Respondent's Board of Directors would have adversely affected the employment status of Harris and would have been disciplinary in nature.

5. That prior to the meeting on October 2, 1972, Harris had been certified as eligible for promotion, along with two other applicants, to the rank of Sergeant in accordance with the promotional policies of the Racine Police Department; that because he was aware that the contents of the above described article had caused bad feelings towards Harris on the part of a number of police officers in the Department and because he was aware that efforts were under way to attempt to placate those bad feelings, Chief Dodge asked the Police and Fire Commission to defer consideration of his recommendations for promotion from the list in question until its next meeting; that at a subsequent meeting of the Police and Fire Commission occurring on November 27, Chief Dodge recommended Harris for promotion to Sergeant and his recommendation was approved; that Chief Dodge's decision to ask the Police and Fire Commission to defer action on his recommendations for promotion to Sergeant was based solely on his concern for the morale problems extant in the Police Department at that time and not because of any action of the Respondent, its officers or agents; that Chief Dodge did not take any action on the request of the Respondent's Board of Directors that Harris be "put back in a blue uniform" and reassigned to the third shift.

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

#### CONCLUSION OF LAW

That the Racine Policemen's Professional and Benevolent Corporation, by the actions of its Board of Directors in asking Chief Dodge to "put [Harris] back in a blue uniform" and reassign him to the third shift, without regard to Sylvester Lee Harris' rights in the matter, failed to fairly represent and consequently coerced and intimidated an employee in the enjoyment of his legal rights and has committed prohibited practices within the meaning of Section 111.70(3)(b)3 and Section 111.70(3)(b)1 of the Municipal Employment Relations Act.

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

ORDER

IT IS ORDERED that the Racine Policemen's Professional and Benevolent Corporation, its Board of Directors, officers and agents shall immediately:

1. Cease and desist failing to fairly represent and thereby coercing and intimidating Sylvester Lee Harris in the enjoyment of his legal rights under the Municipal Employment Relations Act including those rights guaranteed in Section 111.70(2) of said Act.
2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act:
  - a. Notify all employees employed in the bargaining unit which it represents that it will fairly represent all employees and that it will not coerce or intimidate any employees represented by it in the enjoyment of their legal rights, including those rights guaranteed by Section 111.70(2) of the Municipal Employment Relations Act, by posting the notice attached hereto and marked "Appendix A" in its offices and in any places provided by the City of Racine in its Police Department for the posting of notices by the Respondent. Said notices shall be signed by the principal officer of the Respondent and shall remain posted for sixty (60) days. The Respondent shall take all reasonable steps necessary to insure that said notices are not altered, defaced or covered by any other material.
  - b. Notify the Wisconsin Employment Relations Commission in writing within twenty (20) days from the date of this Order regarding what steps it has taken to comply with this Order.

Dated at Madison, Wisconsin this 18th day of April, 1974

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli /s/  
George R. Fleischli, Examiner

APPENDIX A

NOTICE TO ALL EMPLOYEES REPRESENTED BY THE RACINE  
POLICEMEN'S PROFESSIONAL AND BENEVOLENT CORPORATION

Pursuant to an Order of the Wisconsin Employment Relations Commission all employees of the Racine Police Department represented by the Racine Policemen's Professional and Benevolent Corporation are hereby notified that the Racine Policemen's Professional and Benevolent Corporation, its Board of Directors, officers and agents will fairly represent, all employees represented by it and will not coerce or intimidate any employees represented by the Racine Policemen's Professional and Benevolent Corporation in the enjoyment of their legal rights under the Municipal Employment Relations Act including those rights guaranteed in Section 111.70(2) of the said act.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1974.

---

THIS NOTICE MUST REMAIN POSTED FOR SIXTY (60) DAYS FROM THE DATE  
HEREOF AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY MATERIAL.

**RACINE POLICEMEN'S PROFESSIONAL AND BENEVOLENT CORPORATION, I,**  
**Decision No. 12637**

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

In his complaint, the Complainant alleges that the Respondent has violated Section 111.70(3)(b)2 of the Municipal Employment Relations Act (MERA), by the following conduct:

"4. That during the month of October, 1972, the Association sought to interfere with the rights guaranteed your complainant in Wis. Stats. Section 111.70(2), by attempting to coerce the Chief of Police of the City of Racine to prefer disciplinary charges against complainant because of the news story concerning complainant annexed hereto as Exhibit A, which appeared in the Racine Star Times, a weekly newspaper published in the City of Racine, following an interview between the reporter of said paper and your complainant in the course of your complainant's duties as Director of the Community Relations Department of the Racine Police Department; that when the Chief of Police of the City of Racine refused to prefer any charges against your complainant, despite the demand of the Association, the Association then insisted the Chief of Police transfer your complainant from the first to third shift on the Racine Police Department and walk a beat, rather than engage in his duties as Director of the Community Relations Department, so as to cause a demotion from complainant's position as Director of the Community Relations Department; that although the Racine Chief of Police again refused to take any disciplinary action against your complainant, the Chief of Police has advised your complainant that because of the coercion attempted by the Association and for no other reason, he has deferred promotion of your complainant and will not delegate to your complainant the authority needed to effectively supervise and administer the Community Relations Department.

5. That the aforesaid coercion exerted by the Racine Police Benevolent Association upon the Chief of Police, so as to adversely affect your complainant, is totally contrary to the collective bargaining agreement in effect between the Association and the City of Racine, is without any legal authority, and constitutes a prohibited practice within the meaning of Wis. Stats. Section 111.70(3)(b)2, in that the Association has sought to coerce the Chief of Police to discipline and punish your complainant for acts which were totally lawful on the part of your complainant, within the scope of his duties as Director of the Community Relations Department of the Racine Police Department, and were an enjoyment of his legal rights including those of free speech and freedom of association."

Neither the City of Racine nor Chief Dodge was made a Respondent in this proceeding and the Complainant does not seek any remedial relief from the City of Racine or any of its agents. The Complainant does ask that the Respondent be ordered to cease and desist from engaging in the conduct alleged and take any other affirmative action deemed appropriate by the Commission.

The Respondent denies that it engaged in the conduct as alleged or that it has violated Section 111.70(3)(b)2 of MERA 1/ and asks that the complaint be dismissed.

1/ In its Answer, the Respondent denied the factual allegations contained in paragraph 4 set out above, but inadvertently failed to deny the conclusions of law alleged in paragraph 5 of the complaint and was allowed to amend its Answer at the conclusion of the hearing over the objection of the Complainant. See ERB 12.03(5).



In his brief, the Complainant contends that the Respondent has attempted to coerce, intimidate or induce Chief Dodge to interfere with his legal rights under the First Amendment of the United States Constitution. The Complainant's allegation in that regard is apparently based on a broad interpretation of the reference to "legal rights" contained in Sections 111.70(3)(b)1 and 2 of the MERA.

The Examiner has been unable to find any case where the Commission has construed the language in question in the way suggested by the Complainant. There are numerous Commission cases holding that employees, individually or acting in concert, are prohibited from attempting to interfere with, or induce an employer to interfere with, another employee's right to refrain from joining the union or engaging in other protected activities. The legal rights protected in these cases are the rights that stem from the Act and not from the United States Constitution or other sources.

If the Commission were to adopt the interpretation of Section 111.70(3)(b)1 and 2 urged by the Complainant, it could be called upon to entertain complaints wherein an employee alleges that another employee, (acting individually or in concert), was interfering with any of his legal rights or seeking to persuade the employer to do so, notwithstanding the fact that the Commission lacks expertise in defining and protecting those rights and the fact that the courts and other administrative agencies have such expertise. It is obvious that the legislature did not intend that the Wisconsin Employment Relations Commission seek to protect all legal rights of individuals who happen to be employees from interference by other individuals who also happen to be employees. The first question that must be answered then is whether the legal rights sought to be protected herein, which are undeniably important and cherished, are protected from interference through the prohibited practice procedures of the MERA.

Section 111.70(3)(b)1 and Section 111.70(3)(b)2 of the MERA are parallel, in that they both seek to protect an employee from interference with his protected legal rights by other employees acting individually or in concert, and read as follows:

"(b) It is a prohibited practice for a municipal employee, individually or in concert with others:

1. To coerce or intimidate a municipal employee in the enjoyment of his legal rights, including those guaranteed in sub. (2).
2. To coerce, intimidate or induce any officer or agent of a municipal employer to interfere with any of its employees in the enjoyment of their legal rights, including those guaranteed in sub. (2), or to engage in any practice with regard to its employees which would constitute a prohibited practice if undertaken by him on his own initiative."

Unlike Section 111.70(3)(a)1, which applies to municipal employers and states that it shall be a prohibited practice for a municipal employer to interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed by Section 111.70(2), Sections 111.70(3)(b)1 and 2 appear to outlaw interference with legal rights other than those specifically enumerated in Section 111.70(2). This same asymmetry appears in the prohibited practice provisions contained in Section 111.84 of the State Employment Labor Relations Act (SELRA) and apparently stems from the unfair labor practice provisions of the Wisconsin Employment Peace Act (WEPA) set out in Section 111.06 of the Wisconsin Statutes.

According to an acknowledged authority on the subject, WEPA, unlike the National Labor Relations Act, (Wagner Act) initially sought to protect the rights of individual employees not only against infringement by the employer but by other employees acting individually or in concert:

"The points in which the Wisconsin Employment Peace Act departs from the scheme of the National Labor Relations Act represent a distinct difference in philosophy as to what practices need to be prevented for the avoidance of industrial conflict. This difference in philosophy is apparent in the very first provisions of the two laws containing their declarations of policy. The National Labor Relations Act is introduced by a recital that the denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to industrial strife or unrest which burden and obstruct interstate commerce, that inequality of bargaining power between employees and employers likewise burdens commerce and tends to aggravate recurrent business depressions, and that these results are to be avoided by encouraging collective bargaining and protecting the workers' freedom of association. Pursuant to this declaration of policy, the national act is designed to protect the employees' rights against infringement by employers only. The Wisconsin Act, on the other hand, recognizes in its declaration of policy the interrelated interests of 'the public, the employees, and the employer.' It seeks to guarantee the fundamental rights of employees not only against infringement by the employer, but also against infringement by employees, labor unions, and other parties." (Footnotes omitted).

. . . .

Wisconsin turned its back upon the reasoning which motivated Congress to reject regulation directed against employees. It provided protection of the individual's right of free choice on matters of labor activity as against all challengers, and furnished some degree of protection to employers themselves . . ." 2/ (Emphasis Supplied).

Section 111.06(2)(a) of the WEPA contains some examples of the kinds of legal rights the legislature evidently had in mind in outlawing the conduct in question. It reads as follows:

"(2) It shall be an unfair labor practice for an employee individually or in concert with others:

(a) To coerce or intimidate an employee in the enjoyment of his legal rights, including those guaranteed in section 111.04, or to intimidate his family, picket his domicile, or injure the person or property of such employee or his family." (Emphasis Supplied).

Viewed in its historical context, it appears that although the language in question may have been intended to extend protection to legal rights other than those specifically enumerated in the rights section of the three statutes involved (Section 111.04 of WEPA; Section 111.70(2) of MERA; and Section 111.82 of SELRA), it is also clear

---

2/ Lampert, "The Wisconsin Employment Peace Act", 1946 Wisconsin Law Review 194 (1946) pp. 195-196.

that the legislature did not create the Wisconsin Employment Relations Commission for the purpose of protecting all the legal rights of persons who happen to be employees within the meaning of the three acts. If Sections 111.06(2)(a) and (b), Sections 111.70(3)(b)1 and 2 and Sections 111.84(2)(a) and (b) are construed in such a way as to protect employees from interference with any of their legal rights regardless of the origin of those rights or the motivation for the interference, the Commission could be called upon to entertain complaints alleging interference with legal rights under circumstances bearing no relationship to the employment situation.

For these reasons, the Examiner concludes that the legislature did not intend to protect the exercise of legal rights other than those specifically set out in the rights section of the three statutes unless it can be said that the legal rights sought to be protected are rights established by other provisions of the statute or the employee or employees who are allegedly interfering with the employee's other legal rights (such as the right of free speech) are motivated by the employee's exercise of his rights under the statute.

The rights which were allegedly interfered with herein, according to the Complainant's argument, are not rights protected by Section 111.70(2) which are essentially the rights to engage in lawful concerted activity or refrain therefrom. Harris was not engaging in any lawful concerted activity or refraining therefrom when he granted an interview to the Racine Star Times. He was engaged in conduct which, on its face, constituted protected free speech in the absence of an affirmative showing that there was a valid rule or order prohibiting the speech in question or an affirmative showing that he made false statements knowingly or recklessly. 3/

The Commission has held in several cases that when municipal employees exercise their rights of free speech coincidental with their right to engage in concerted activity or refrain therefrom, that such exercise is protected from unlawful interference. 4/ If the Complainant had been engaged in the exercise of his right to refrain from concerted activity at the time he exercised his rights of free speech, the Respondent's conduct would clearly be a violation of Section 111.70(3)(b)2 under the theory advanced by the Complainant. However, the facts do not support such a finding. 5/

There is another basis, not specifically argued by the Complainant, which supports a finding that the Respondent interfered with the protected legal rights of the Complainant. As a concomitant of its rights as the exclusive bargaining representative, the Respondent has

---

3/ Pickering vs. Bd. of Ed. 391 US 563, 88 Sup. Ct. 1731 (1968).

4/ West Bend Board of Education (7938-A) 4/68; City of Madison (9582-B and 9582-C) 6/71 and 7/71.

5/ Although the evidence discloses that Harris is not a member of the Respondent labor organization and merely contributes the equivalent of dues pursuant to a fair share agreement, there is no evidence of

a duty to represent all employees fairly. 6/ While it may not be inappropriate for a labor organization, particularly one representing police or professional employees, to bring alleged misconduct on the part of one of the employees represented by it to the employer's attention, it was clearly inappropriate for the Respondent to unilaterally seek to increase the disciplinary action already taken against such an employee without having consulted him or otherwise considering or presenting his side of the story. While a Union might not violate its duty of fair representation in an appropriate case, by asking an employer to increase a disciplinary penalty against one of the employees represented by it, the procedure followed by the Union in this case unavoidably deprived Harris of fair representation. The Respondent's duty to represent Harris fairly, which stems from its status as the exclusive bargaining representative, is clearly a legal right within the contemplation of Section 111.70(3)(b)1 of the MERA. When the Respondent presented the case against Harris totally without regard for his side of the story it placed itself in a posture incompatible with its duty of fair representation and it violated Section 111.70(3)(b)3 and 1 of MERA.

For the above and foregoing reasons the Examiner finds that the Respondent has interfered with the legal rights of the Complainant protected by Section 111.70(3)(b)3 and 1 of the Wisconsin Statutes and has ordered appropriate remedial relief.

Dated at Madison, Wisconsin this 18<sup>th</sup> day of April, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By George R. Fleischli /s/  
George R. Fleischli, Examiner

---

6/ Northwest General Hospital (10599-B and 10600-B) 1/73. Also Cf. Miranda Fuel Co., Inc. 140 NLRB 181, 51 LRRM 1584 (1962); Hughes Tool Co. 147 NLRB 1573, 56 LRRM 1289 (1964) and Galveston Maritime Association 148 NLRB 897, 57 LRRM, 1083 (1964).