

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SAWYER COUNTY LAW ENFORCEMENT EMPLOYEES :
LOCAL UNION #1213-B, AFSCME, AFL-CIO, :

Complainant, :

vs. :

SAWYER COUNTY, :

Respondent. :

Case XVI
No. 21241 MP-706
Decision No. 15194-A

Appearances:

Lawton and Cates, Attorneys at Law, by Mr. Bruce F. Ehlke, Esq.,
and Mr. Richard Erickson, Representative, on behalf of
Complainant.

Mulcahy and Wherry, Attorneys at Law, by Mr. Robert M. Hesslink
Jr., Esq., and Mr. Ernest Lein, Sheriff, on behalf of
Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

AMEDEO GRECO, Hearing Examiner: Sawyer County Law Enforcement Employees Local Union #1213-B, AFSCME, AFL-CIO, herein Complainant, filed a complaint with the Wisconsin Employment Relations Commission, herein Commission, wherein it alleged that Sawyer County, herein Respondent, had violated Sections 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act, herein MERA, by transferring Ms. Nadine Nikodem out of the bargaining unit. The Commission thereafter appointed the undersigned to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes. Respondent thereafter filed an answer wherein it denied the allegations. Hearing on said complaint was held at Hayward, Wisconsin, on March 30, 1977. Both parties thereafter filed briefs and reply briefs. Having considered the evidence and the briefs, the Examiner makes the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Sawyer County Law Enforcement Employees Local Union #1213-B, AFSCME, AFL-CIO, is a certified 1/ labor organization which represents for collective bargaining purposes certain law enforcement personnel employed by Sawyer County.

2. Sawyer County, a municipal employer, operates a sheriff's department.

3. The parties have been privy to several collective bargaining agreements, including one for the 1976 year. Addendum "A" of said contract provided for the position of "deputy clerk", along with an

1/ At the time of the certification, the position of deputy clerk was vacant. Accordingly, the Commission did not make a determination as to whether that position, which was occupied by Nikodem prior to her transfer, should be in the unit.

hourly rate. Said contract also provides that Respondent recognizes Complainant as the representative for "all law enforcement personnel employed by the Sawyer County Law Enforcement Department, excluding the Sheriff, and all other employees. . . ."

4. Ms. Nadine Nikodem, worked for Respondent as a matron for some time before 1974. In 1974, Ms. Nikodem began employment as a part time deputy clerk. In 1975, Nikodem began employment as a full time deputy clerk.

5. After her appointment to full time status, Ms. Nikodem was issued a uniform, a badge, a gun, and a special deputy card. The special deputy card was also issued to Respondent's matrons. After a short while, then Sheriff Primley issued Nikodem a deputy sheriff's card. Holders of such cards have the power of arrest and they can effectuate such arrests when they accompany other police officers whose names are on file with the County Clerk's office. In this connection, the Sheriff's Department is required yearly to file with the County Clerk a list of individuals who have the power of arrest. It is undisputed that Ms. Nikodem's name was not on the 1975 and 1976 lists. However, it is also true that said lists in the past have been incomplete in that they have omitted the names of police officers who have arrest powers.

6. At the time of her hire, Ms. Nikodem was not sworn in as a police officer. However, no newly hired police officers in recent years have been sworn in at the time of their hire. Thus, it was not until January 1977 that all such officers were sworn in. ^{2/} Furthermore, while Ms. Nikodem at the time of her hire did not file certain required documents relating to her police officer status, it is also true that other officers similarly failed to file such documents at the time of their hire. Additionally, although Ms. Nikodem was required by statute to take 240 hours of training within a certain period in order to qualify as a police officer, and even though Ms. Nikodem failed to take such training, the record also shows that other police officers similarly failed to take the requisite training within the allocated time.

7. As a full time deputy clerk, Nikodem, along with other police officers, attended the uniform crime reporting police school, artist school, and emergency medical training. The record shows that only police officers with the power of arrest attended such schools. Furthermore, Nikodem in the fall of 1976 was slated to take the 240 hour training course during the spring of 1977.

8. During her tenure as a full time deputy clerk, Nikodem never went out alone to make arrests. Furthermore, but for one exception when she accompanied her husband, who is also a police officer, Nikodem has been called out of the office only when female suspects were involved in certain incidents. However, the record does show that Nikodem has arrested suspects, that she has read the Miranda rights to other suspects, and that she has helped other officers during their arrests.

9. Nikodem was very active on behalf of the Union and served as the Union's secretary treasurer. In addition, Union dues have been deducted from Nikodem's pay check.

10. On or about January 4, 1977, Sheriff Lein, who had just taken over the department, advised the Union that he was taking away

^{2/} The record is somewhat unclear as to whether Nikodem was also sworn in at this time.

Nikodem's deputy sheriff card and that she would be issued a special deputy sheriff's card until such time as she completed her 240 hours of training. Shortly thereafter, Lein advised Nikodem that she would not be allowed to take such training and that she would thereafter perform only clerical functions. Tony Jonjak, Chairman of Respondent's County Board, acknowledged that Nikodem was removed from her duties because she allegedly had access to certain confidential materials affecting the Union. As a result, Respondent decided to abolish Nikodem's prior position and to transfer her to a strictly clerical function. It is undisputed that since January 1977 Nikodem has performed only clerical duties. Subsequent to the transfer, the parties agreed that Nikodem would be covered by the collective bargaining agreement if it was later determined that she was properly in the collective bargaining unit.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and enters the following

CONCLUSION OF LAW

Respondent's decision to take Nikodem out of the bargaining unit was based in part on the fact that she was an active Union member and, as a result, said transfer constituted a prohibited practice within the meaning of Section 111.70(3)(a)1 and 3 of MERA.

Upon the basis of the above and foregoing Findings of Fact and Conclusion of Law, the Examiner makes and enters the following

ORDER

IT IS ORDERED that Respondent, Sawyer County, its officers and agents, shall immediately:

1. Cease and desist from transferring Nadine Nikodem, or any other employees, out of the bargaining unit because of their affiliation on behalf of the Union.
2. Take the following affirmative action which will return the parties to the status quo ante and which serves to effectuate the purposes of MERA:
 - (a) Immediately offer to transfer Nadine Nikodem to her former position as a police officer and pay to her whatever benefits, if any, that she would have received as a police officer that she has not received as a clerical employee.
 - (b) Notify all employees by posting in conspicuous places in its offices where employees are employed copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Respondent and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by other material.
 - (c) 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 herewith.

Dated at Madison, Wisconsin this 19th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Amedeo Greco
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Wisconsin Employment Relations Act, we hereby notify our employees that:

1. WE WILL offer to transfer Nadine Nikodem to her former position as a deputy clerk.
2. WE WILL NOT transfer Nadine Nikodem, or any other employees, because of their Union activities.
3. WE WILL NOT in any other or related manner interfere with the rights of our employees, pursuant to the provisions of the Wisconsin Employment Relations Act.

By _____
Sawyer County

Dated this _____ day of _____, 1978.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainant primarily alleges that Nikodem was properly included within the certified law enforcement bargaining unit and that Respondent's admitted transfer of Nikodem to a clerical position was unlawful.

The resolution of this issue primarily centers on two issues: (1) did Nikodem have the power of arrest so as to be properly included within the certified unit in the first place; and (2) if so, did Respondent act unlawfully when it transferred her out of the unit to a strictly clerical position.

As to issue (1), Nikodem's powers of arrest, the record shows that Nikodem was issued a policeman's uniform, a badge, and a gun. It appears that matrons in Respondent's police department are not issued either badges, uniforms, or guns. 3/ In addition, by the time of her transfer, Nikodem had been issued a deputy sheriff's card. 4/ Testifying on the effect of said card, Sheriff Lein conceded that the card enabled the recipient to make arrests, if accompanied by a regular police officer. 5/ Lein acknowledged that the holder of said card had such an arrest power, despite the fact that that person's name was not on file with the County Clerk's office. Furthermore, based on Nikodem's credited testimony, as well as the credited testimony of police officer Michael Szula, the record shows that Nikodem has accompanied officers on arrests, that she has assisted others in effectuating arrests, that she has read the Miranda warning to suspects, that she has handcuffed suspects, and that she has placed suspects under arrest. 6/ Thus, apparently because she did have the power of arrest, Nikodem attended several educational conferences with other police officers. No other non-police employees attended such conferences. Moreover, at the time of her transfer, Nikodem was scheduled to take a 240 hour training course, which is required of all police officers. Furthermore, the record shows that Respondent agreed that Nikodem was part of the bargaining unit from 1975 to the time of her transfer. In such circumstances, particularly the fact that Nikodem had the power of arrest by virtue of the issuance of the deputy sheriff's card and that Nikodem in fact effectuated arrests, it must be concluded that Nikodem was properly in the law enforcement bargaining unit at the time of her transfer.

In so finding, the Examiner finds distinguishable the two cases cited by Respondent for its proposition that Nikodem should not have

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- 3/ The wife of a former sheriff was issued a gun and she did have the power of arrest. That factor is not conclusive, however, as she was excluded from the bargaining unit apparently because of her confidential status. Furthermore, it does not appear that that person possessed all of the other indicia of police powers which were possessed by Nikodem.
 - 4/ While matrons were issued special deputy cards, it appears that the regular deputy sheriff's card carries with it more power as the recipient of the latter card in some circumstances has the power of arrest.
 - 5/ Transcript, p. 88.
 - 6/ While certain witnesses claimed that Nikodem did not have arrest powers, the Examiner is satisfied that the totality of the record establishes otherwise.

been included in the bargaining unit. In one case, Waukesha County, Decision No. 14534-A, C (11/76) the Commission found that dispatchers and correctional officers were not law enforcement personnel within the meaning of Section 111.77 of MERA. That case is distinguishable, however, as there was no evidence in that case, as there is here, that the individuals in dispute possessed deputy sheriff cards and that they effectuated arrests. In the second cited case, City of Beloit, Decision No. 15112 (12/76), the Commission also found that communications operators did not have the power of arrest and that they were excluded from a law enforcement bargaining unit. Again, the instant case is distinguishable as Nikodem here does have the power of arrest.

In this connection, Respondent argues that Nikodem cannot be considered a law enforcement officer because Nikodem has failed to meet certain requirements relating to law enforcement status. Thus, Respondent points out that Nikodem did not file certain required information at the time of her hire, that she was never sworn in as a police officer, that she did not attend the 240 hour training program within the required time, and that her name was not on file with the County Clerk as being a law enforcement officer with the power of arrest. While all of this is true, the record also reveals that other admitted police officers in the department also did not file certain information at the time of their hire, that they were never sworn in until January 1977, that some did not attend the training program within the allotted time, and that at least one person was not on the County Clerk list during one year of his employment. Accordingly, it can hardly be said that Nikodem was materially different from other law enforcement personnel. Furthermore, since Nikodem did have the power of arrest, it is immaterial that Nikodem may have failed to meet certain other statutory criteria, as the effect of such non-compliance need not be determined in the instant proceeding.

Since, therefore, Nikodem was properly included in the law enforcement personnel bargaining unit, the next question is whether Respondent's admitted transfer of Nikodem to a clerical function was unlawful.

On this point, Tony Jonjak, Chairman of Respondent's County Board, admitted at the hearing that the County transferred Nikodem because, in his words,

"The reason that we thought we should abolish that position is because she had information that we thought was confidential in the sheriff's department." 7/

Going on, Jonjak conceded that this was the only reason motivating Nikodem's transfer. 8/ At the hearing, however, Respondent failed to offer any evidence to support its contention that Nikodem was a confidential employee. As a result, there is no basis for finding that she should be excluded from the unit on the grounds that she was a confidential employee.

In its defense, Respondent argues that the actions of the County Board cannot be imputed to Sheriff Lein, who supposedly effectuated the transfer on his own and that Sheriff Lein transferred Nikodem solely because she was not qualified to be a police officer. This contention is without merit as Respondent's County Board is entrusted with running the Sheriff's Department and the County Board participated in the decision to transfer Nikodem out of the bargaining unit. In

7/ TR. 120.

8/ Ibid.

such circumstances, the County Board's motivations for transferring Nikodem cannot be disregarded. 9/

Accordingly, and because Respondent did transfer Nikodem in part because of her Union affiliation, 10/ and in the absence of any showing that Nikodem was a confidential employee who deserved to be excluded from the bargaining unit, it must be concluded that Nikodem's transfer was based on Union related considerations in violation of Section 111.70(3)(a)1 and 3 of MERA. 11/

To rectify that conduct, Respondent shall take the remedial action noted above.

Complainant also argues that Respondent's unilateral transfer of Nikodem constituted a refusal to bargain.

As a resolution of this issue would not be material to the case herein, and as Respondent in any event agreed that Nikodem would be covered by the collective bargaining agreement if she was properly in the bargaining unit, it is unnecessary to address this issue.

Dated at Madison, Wisconsin this 19th day of January, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

9/ See, for example, Stanley Boyd Area Schools Decision No. 12504-B, C (4/76), affirmed, (10/76), wherein the Commission held that a decision to discharge an employee was unlawful, even if only some of those participating in the decision were motivated by discriminatory anti-Union considerations.

10/ Since Nikodem's transfer was in part based on anti-Union considerations, it is immaterial that Lein may also have had other legitimate reasons to transfer her. See, Muskego Norway Consolidated Schools v. Wisconsin Employment Relations Board 35, Wis. 2d 540, wherein the Court held:

"An employee may not be fired when one of the motivating factors is his union activities no matter how many other valid reasons exist for firing him."

11/ See, for example, Rock County Decision No. 13851-A (1/76).