

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GENERAL DRIVERS & HELPERS UNION LOCAL
NO. 662, affiliated with the
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

Case V
No. 21301 MP-716
Decision No. 15243-A

Complainant,

vs.

CITY OF CORNELL (POLICE DEPARTMENT),

Respondent.

Appearances:

Goldberg, Previant and Uelmen, S.C., Attorneys at Law, by
Mr. Alan M. Levy, Esq., on behalf of Complainant.
Mr. Raymond L. Hoel, Esq., on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

General Drivers & Helpers Union Local No. 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, having filed a prohibited practices complaint with the Wisconsin Employment Relations Commission, herein commission, alleging that the City of Cornell (Police Department) has committed certain prohibited practices; and the commission having appointed Amedeo Greco, a member of the commission's staff, to make and issue Findings of Fact, Conclusions of Law and Order; and hearing on said complaint having been held in Cornell, Wisconsin on March 29, 1977; and the parties thereafter filed briefs which were received by June 28, 1977; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That General Drivers & Helpers Union Local No. 662, affiliated with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, herein Complainant, is a labor organization with its principal place of business in Eau Claire, Wisconsin.

2. That the City of Cornell, herein Respondent, constitutes a municipal employer within the meaning of the Municipal Employment Relations Act, herein MERA; that Respondent maintains and operates a police department; that Dale E. Weiss is the Chief of the police department; that Weiss has exercised supervisory authority over the police department, and that Weiss at all times material herein has acted as Respondent's agent.

3. That at all times material herein Respondent's police department, in addition to Weiss, has had three police officers, Dennis Thompson, Edward Endres, and Ronald Lewis; that the department also included four dispatchers; and that the dispatchers do not carry weapons, they are not deputized, and they do not have the power of arrest.

4. That Lewis was hired as a probationary employe on July 26, 1976; and that Lewis' six month probationary period was to last until January 25, 1977.

5. That Weiss informed Officer Thompson in the latter part of 1976 that Lewis was doing a good job and that Lewis was going to be taken off probation in the beginning of 1977; that Weiss made the same statement to Lewis on December 24, 1976; that Weiss experienced no difficulty with Lewis' work until the latter part of 1976; that Lewis as of January 1, 1977 received a ten (10) dollar a week raise; that a raise was then given to all of Respondent's employes; that Respondent, as of January 1, 1977, paid for all of Lewis' health insurance; that said insurance had formerly been paid by Lewis; and that Respondent has a policy under which it does not pay for the full insurance coverage of probationary employes.

6. That Chief Weiss on December 3, 1976, advised the police officers, including Lewis, that Respondent's municipal parking ordinance was to be strictly enforced; that Weiss on December 24, 1976, spoke to Lewis about said ordinance and there advised Lewis that Lewis must enforce the no parking ban; that Weiss on the next day issued a written reprimand to Lewis wherein he admonished Lewis for his failure to enforce the no parking ban; that said reprimand ordered Lewis to submit a memorandum on this subject by 8:00 a.m., January 2, 1977; that Lewis did not submit a memorandum by 8:00 a.m. on January 2, 1977; that Weiss on January 2, 1977 wrote a memorandum to Lewis wherein Weiss again asked for a memorandum; that later on in the day Lewis prepared the following memorandum for Weiss:

"Believing that an officer is relied upon his own judgement, past experiences, adroitness or education; whether this be advanced college training, O.J.T., the basic T.A.S.B. or no training at all, the individual officer must make his own decisions at every given time and at every given situation, E.G. a disorderly conduct arrest, a speeding citation or at the present situation to issue a parking citation.

And if the reporting officer believes that an admonitory will adhere, [sic] he should give the involved party this opportunity. My own believe [sic] in making an arrest, such as a parking citation should be relied upon my discretionary law enforcement, with do [sic] regard to adroit and finesse. On the eve of the 24th, I used my professional ability, reasoning and good sound judgment to issue a citation or not to. At the time the vehicles that were on the street were parked in such a manner that I believed they were there at a temporary time, for lights where [sic] on at the residence, probably for Christmas Eve.

I strongly believe that every law that is written should be so justifiable, every police officer should not only know these laws, but also understand these and be able to justify them to the parties involved. I was under the assumption [sic] that the reason for parking citations, was so city snow plows could plow snow during the hours of 2:00AM and 6:00AM. The times that I have worked 11-7AM or 7-3AM, I have not to this date seen any city shop machinery [sic] or vehicles used to remove snow or debris. It should be investigated as to why this has not been done.

It should be mentioned at this time as to why one of my parking citations was dismissed without the consent of the arresting officer, or why was this not brought to my attention. For it is my believe [sic] that, that citation was issued through reasonable prudence and sound judgement of the arresting officer. For if one parking citation is dismissed, all should be dismissed, if one is given a citation, the others should be given citations. This should be explained to the arresting officer."

7. That in response, Weiss by memorandum dated January 5, 1977, advised Lewis that:

"In this instance, your judgement, past experience, adroitness, is not being questioned. What is being refered [sic] to is your refusal in carrying out verbal and written orders. (Police rule no. 5)

Also, the eve of Dec. 24 was not the date to which I was referring. [sic] There were occasions in the past on your tour of duty that there were vehicles parked on the street over-night.

You do not have to justify the city ordinance on no parking, just enforce it. (Police rule and regulation number 49.)

In reference to one of your parking tickets being dismissed; the Municipal Judge can dismiss a parking ticket if circumstances warrant it. In checking with the Judge, I was informed that he takes into consideration the reason the vehicle was left on the street. Also, at any time a ticket is dismissed, the Judge will give reason to the arresting officer, if he so desires."

8. That Weiss was unaware as to whether Lewis subsequently failed to ticket any cars after December 25, 1976; and that Weiss did not canvas the town to see if other police officers had ticketed cars.

9. That by memorandum dated December 13, 1976, Weiss informed Lewis that Lewis had been in the station house for too long a period; and that said memorandum stated:

"On 8 Dec. 76 you were logged in the Station from 0023 to 0123 and from 0407 to 0520 total of 2 hr. 13 min.

On 9 Dec. you were logged in from 0327 to 0505, total 1 hr. 38 min. I think this was brought to your attention verbally, once before."

10. That following the issuance of said memorandum, Weiss had no occasion to criticize Lewis for taking breaks at the station house.

11. That on January 18, 1977, Weiss gave Lewis a written memorandum regarding Lewis' failure to return a contraband necklace; that Weiss there demanded that the necklace be returned by January 19, 1977; that prior to that time Weiss had never asked for the return of the necklace; and that Lewis subsequently did return the necklace a few days later.

12. That Weiss met with Respondent's Police and Fire Commission on January 19, 1977, regarding Lewis' status; that Weiss by letter dated January 19, 1977 informed the Police and Fire Commission that:

"I have requested this meeting to discuss the conduct of Patrolman Ron Lewis.

Officer Lewis has, on several occasions, refused to carry out written and verbal orders issued by me. Also, he has, on several occasions, violated Police Department Rules and Regulations.

When this was brought to his attention, he indicated that he thought State Laws, City Ordinances, and General Orders should be justified.

It is stressed in the Patrolman Job Scope that the officer is to carry out all written and verbal orders.

I have had numerous complaints from motorists about his attitude while he was in contact with them. They describe his attitude as 'cocky' and 'smart aleckie'.

I have asked these complainants [sic] to put it down as a complaint, but they say they don't want any trouble with the Police in Cornell.

I realize there are bound to be a certain number of complaints about any officer who is doing any job at all, but when the complaints come from not only the city, but the surrounding area as well, and from people of all walks of life, it is my decision that there must be some basis for them.

It is my opinion that Officer Lewis is not the type of officer the City of Cornell wants, or needs. I do not want an officer I can not [sic] depend upon to carry out a direct order when one is issued to him.

Officer Lewis was informed when he was hired that he was under a six month probation period and could be terminated for no cause.

I feel at this time that Officer Lewis should be terminated as soon as possible."

13. That Respondent's Police and Fire Commission met on January 19, 1977 regarding Lewis' status; that Lewis was not accorded an opportunity to attend said meeting; that there was no discussion at that time regarding union activities; that Weiss there recommended that Lewis not be retained; that Weiss never informed the Police and Fire Commission that he had not experienced any difficulty with Lewis regarding his visiting the station house and the issuance of parking tickets, subsequent to the issuance of the above noted memoranda on these subjects; and that the Police and Fire Commission by majority vote there decided not to retain Lewis past his probationary period.

14. That by letter dated January 20, 1977, Weiss informed Lewis that:

"This letter is to inform you that the Police and Fire Commission has

15. That on December 27, 1976, Complainant's president, James Novacek, met with Officers Lewis, Endres, and Thompson and there discussed the need for a union; that Lewis, Endres, and Thompson on that day all signed union authorization cards on behalf of Complainant; and that by letter dated December 28, 1976, Novacek wrote to Jerry Prentice, the Mayor of Cornell, and there informed Prentice that:

"Having signed your employees in the Police Department of the City of Cornell, Wisconsin, into our Union, we are desirous of meeting with you for the purpose of negotiating a contract covering wages, hours and working conditions for employment of said members.

So that there will be no confusion in the continuous employment of the employees and so that there will be no discrimination, I wish to quote to you part of the Act:

'Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .'

'It shall be an unfair labor practice for an Employer

1. to interfere with, restrain, or coerce employees in the exercise of the right guaranteed;
2. by discrimination, in regard to hiring or firing, to encourage or discourage or interfere with membership in any labor organization.'

We will be happy to meet with you at any time convenient for the purpose of these negotiations, and in order to expedite matters, we are requesting a meeting with you on Monday, January 10, 1977, at 1:30 p.m. at your office at City Hall in Cornell, Wisconsin, at which time we will show you proof of representation.";

and that Respondent's Assistant City Clerk received said letter on December 29, 1976.

16. That Respondent's officials, including Mayor Jerry Prentice, Attorney Hoel, and Clerk-Treasurer, Robert Currie, on January 10, 1977, met with Novacek regarding the Union's request for recognition; that Weiss did not attend said meeting; that Novacek there displayed the three union authorization cards; that Respondent there refused to voluntarily recognize Complainant as the collective bargaining representative of its police officers; and that as of the instant hearing, Respondent has refused to recognize Complainant as the representative of said employes.

17. That except for signing a union authorization card, Lewis did not assume any leadership role in the union's organizing drive; that Lewis and Weiss talked about the need for a union on December 24, 1976; that Weiss there said that there would be no point for the officers to join the union because the union had caused nothing but problems the previous time; that Lewis did not then indicate whether the officers were going to join a union; that Officer Thompson asked Weiss to join the union around Christmas time, 1976; that Weiss declined to do so; and that Respondent's officers were previously represented by a union which was subsequently decertified.

18. That Respondent did not terminate Lewis' employment because of anti-union considerations.

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

CONCLUSIONS OF LAW

1. That Respondent's termination of Lewis' employment was not violative of Section 111.70(3) (a) 3 of MERA.

2. That Respondent's refusal to bargain with Complainant was not violative of Section 111.70(3) (a) 4 of MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that the complaint allegations be, and the same hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin this 3rd day of August, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By

Amedeo Greco
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING FINDINGS
OF FACT, CONCLUSIONS OF LAW AND ORDER

Complainant asserts, and Respondent denies, that Respondent:
(1) unlawfully terminated Lewis because of his union activities; and
(2) unlawfully refused to bargain with Complainant.

At the outset, it should be noted that it is the Complainant who has the burden of proving by a clear and satisfactory preponderance of the evidence that Respondent's termination of Lewis was based, at least in part, on anti-union consideration. ^{1/} To prevail, Complainant must therefore establish that Lewis was active in union affairs and that Respondent had knowledge of such activities, that Respondent bore animus against Lewis because of such activities, and that, finally, Respondent's stated reasons for terminating Lewis were pretextual in nature, and that one of the reasons for the termination was based on the fact that Lewis had engaged in union activities.

As to Lewis' union activities, Lewis signed a union authorization card on December 27, 1976, and Novacek displayed said card to Respondent's officials on January 10, 1977. Furthermore, Lewis spoke in general terms to Weiss on December 24, 1976 regarding the possibility of a union. At about the same time, Officer Thompson also asked Weiss to join the union. Moreover, it is undisputed that Complainant by letter dated December 28, 1976, informed Respondent that it was seeking to represent police department employes. In light of the above, there is no question but that Respondent knew of the union's organizing drive and that it learned by January 10, 1977 that Lewis had signed a union authorization card.

Turning to the question of union animus, the record fails to directly establish that Respondent bore any animus against the union's organizing efforts. The only indirect evidence of such animus is Lewis' claim that Weiss told him on December 24, 1976 that there would be no point for the officers to join the union because the union had caused nothing but problems the previous time. Although Weiss denied making this statement, the Examiner has credited Lewis' account on this conversation. In doing so the Examiner notes that Weiss admitted that he did discuss the subject of unionization with Lewis on or about December 24, 1976. Furthermore, Weiss conceded that he and other officers had previously sought to decertify the union, thereby indicating that Weiss had been unhappy with the union. In light of these factors, as well as the fact that Lewis appeared to be more credible than Weiss, the Examiner has credited Lewis' account of the December 24, 1976 conversation. However, Weiss' statement to Lewis that the union would cause problems does not necessarily reflect union animus, as such a statement can be subject to differing interpretations.

Despite this lack of direct union animus, it is nonetheless possible to find that Respondent's stated reasons for terminating Lewis were pretextual in nature and thereby infer that the real reason for terminating Lewis was based on anti-union considerations.

1/ St. Joseph's Hospital (8787-A,B) 10/69, 12/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71 and AC Trucking Co., Inc. (11731-A) 11/73.

Here, there are a number of factors which support Complainant's case. For example, Respondent paid for all of Lewis' health insurance as of January 1, 1977, something which Respondent ordinarily does only for those employes who are off probation. This fact indicates that Lewis may have been taken off probation by January 1, 1977. If so, that would be consistent with Weiss' prior statements. Thus, Officer Thompson testified that Weiss told him in late 1976 that Lewis was doing a good job and that Lewis was going to be taken off probation in the beginning of 1977. Weiss did not deny this statement. Furthermore Lewis credibly testified that Weiss made a similar statement to him on December 24, 1976. Although Weiss denied making this statement, the Examiner has credited Lewis' testimony, as it is unlikely that Weiss would tell Thompson that Lewis would be retained while at the same time not tell Lewis of that fact. In light of the above, it therefore appears that Weiss was happy over Lewis' work and that he intended to retain Lewis after his probationary period had ended.

Moreover, although Respondent claims that Lewis' performance deteriorated in December, 1976 and January, 1977, it appears Lewis corrected his conduct after the matters were brought to his attention. Thus, although Weiss reprimanded Lewis for failing to turn in a contraband necklace, the Examiner credits Lewis' testimony that Weiss never asked him to return the necklace earlier. Moreover, Lewis returned the necklace shortly after the reprimand was issued. Furthermore, while Weiss reprimanded Lewis when Lewis stayed in the police station for too long a period, Lewis never repeated that conduct after he was reprimanded. Additionally, although Weiss on December 25, 1976 reprimanded Lewis for his failure to ticket cars, Weiss admitted that he was unaware after that date as to whether Lewis thereafter failed to properly ticket cars.

Reviewing the above, then, the record shows that Lewis was active on behalf of the union, that Respondent knew of such activity, that Weiss intended to retain Lewis after his probationary period ended, that Lewis received full health insurance as of January 1, 1977, that Lewis corrected deficiencies in his work when they were brought to his attention, and that Weiss told Lewis that the union would cause problems. Standing alone, these factors lend some support to Complainant's claim that Lewis was terminated because of anti-union consideration.

Here, however, these factors must be considered alongside Lewis' January 2, 1977 memorandum to Weiss, which is set forth in paragraph six of the Findings of Fact. That memorandum clearly establishes that Lewis believed that he should have some discretion in enforcing Respondent's no parking ban and that, accordingly, he would not enforce that ban in all circumstances. Lewis' position, then, was in direct conflict with Weiss' directive that the no parking ban had to be strictly enforced and it represented a fundamental difference of opinion as to how laws should be enforced. Because this difference of opinion was so basic, Weiss had some grounds for believing that Lewis would not enforce the no parking ban properly. It is not impossible to believe, therefore, that Weiss may have reconsidered his prior position and that he may have concluded that Lewis should not be retained past his probationary period, once the no parking controversy had surfaced.

Accordingly, and because there is no clear evidence of union

Turning to the refusal to bargain allegation, the record establishes that Novacek on January 10, 1977 showed the three authorization cards herein to Respondent's officials. 2/ However, since Respondent never agreed to be bound to the results of such a card check, and because Respondent was not required to bargain with Complainant absent an election, there is no basis for finding that Respondent's subsequent refusal to bargain with Complainant was unlawful. This complaint allegation has therefore been dismissed.

Dated at Madison, Wisconsin this 3rd day of August, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco
Amedeo Greco, Examiner

2/ Since the dispatchers cannot be included in a bargaining unit with the police officers herein, the police officers, exclusive of Weiss, constitute an appropriate collective bargaining unit.