

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL 48,  
AMERICAN FEDERATION OF STATE, COUNTY,  
AND MUNICIPAL EMPLOYEES, AFL-CIO and  
OSCAR BALLI,

Complainants,

vs.

CITY OF MILWAUKEE and HAROLD A. BREIER,  
CHIEF OF POLICE, MILWAUKEE POLICE DEPT.

Respondents.

Case CCI  
No. 24797 MP-995  
Decision No. 17117-A

Appearances:

Podell, Ugent & Cross, S.C., by Mr. Alvin R. Ugent, appearing  
on behalf of the Complainants.

Mr. John F. Kitzke, Principal Assistant City Attorney,  
appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

The above-named Complainants having filed a complaint with the Wisconsin Employment Relations Commission on June 22, 1979, alleging that the above-named Respondents had committed certain prohibited practices within the meaning of the Municipal Employment Relations Act (MERA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Stats.; and hearing on said complaint having been held before the Examiner in Milwaukee, Wisconsin, on October 25, 1979; and a transcript of said hearing having been received by the Examiner on November 30, 1979; and the parties having elected not to file briefs; the Examiner having considered the evidence and the arguments of the parties, makes the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. Milwaukee District Council 48, AFSCME, AFL-CIO, herein Complainant Union, is a labor organization which functions as the exclusive collective bargaining representative of certain unsworn individuals employed by the City of Milwaukee within its Police Department. One such employe is Oscar Balli, herein Complainant Balli, who is classified as a Custodial Worker II.

2. City of Milwaukee, herein Respondent City, is a municipal employer which has Harold A. Breier, herein Respondent Breier, functioning as its Chief of Police.

3. On or about May 18, 1979, Complainant Balli's supervisor, James Ballenger, read him a document entitled Milwaukee Police Department Charges which set forth certain violations of the Milwaukee Police Department Rules and Regulations which Complainant had allegedly committed and which indicated that a Board of Inquiry would be held on May 22, 1979 with respect to said allegations. Ballenger informed Complainant Balli that he did not have to appear before the Board of Inquiry. Complainant Balli then read the document and ascertained where the Board of Inquiry would be held.

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4. On May 22, 1979 Respondent City denied Complainant Balli's request that he be represented by Complainant Union before the Board of Inquiry. Complainant Balli then voluntarily appeared before said Board without union representation and entered a plea of not guilty. The Board of Inquiry, which consisted of three sworn supervisory employees and two unsworn employees represented by Complainant Union, heard testimony from Complainant Balli and others and then unanimously found Complainant Balli guilty of the charges and recommended to Respondent Breier that he receive a ten day unpaid suspension as a penalty. On May 22, 1979 Respondent Breier issued an Order suspending Complainant Balli for ten days without pay. Complainant Balli served said suspension.

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

CONCLUSION OF LAW


Respondents City of Milwaukee and Harold A. Breier, by refusing to allow Complainant Oscar Balli union representation before the Board of Inquiry, did not commit a prohibited practice within the meaning of Sections 111.70(3)(a)1, 2, 3, 4 and 5; 111.70(3)(b)1, 2, 3, 4, or 111.70(3)(c), Stats.

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

ORDER

The instant complaint is hereby dismissed.

Dated at Madison, Wisconsin this 18th day of January, 1980.

By   
Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER

Complainants assert that Respondents improperly denied Complainant Balli's request for union representation before the Board of Inquiry and thereby committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2, 3, 4 and 5; 111.70(3)(b)1, 2, 3 and 4; and 111.70(3)(c), Stats. As support for said assertion they cite the Schmidt 1/ and Rhodes 2/ decisions wherein it was concluded that Respondent City violated Section 111.70(3)(a)1, Stats., by denying effective union representation to sworn employees of the Milwaukee Police Department who were compelled to appear before said Board. At the conclusion of Complainants' case, Respondents made a motion to dismiss all of the foregoing alleged prohibited practices. The Examiner granted said motion with respect to all of the alleged prohibited practices except Sections 111.70(3)(a)1 and 111.70(3)(c), Stats. Said action was based upon the Examiner's conclusion that even if the facts were as Complainants alleged, only Sections 111.70(3)(a)1 and 111.70(3)(c) 3/ would arguably have been violated. The remainder of the instant decision will focus upon the allegation of interference which was not dismissed at the hearing.

In Schmidt it was found that the Board of Inquiry was an agent of Respondents City of Milwaukee and Harold A. Breier in light of its authority to effectively recommend discipline, its management dominated composition and the fact that it existed only because of management promulgated rules. A finding of agency is equally appropriate in the instant matter inasmuch as the Board's disciplinary "recommendation" was adopted by Respondent Breier on the same day it was made, its management dominated composition remains, and it continues to owe its existence to management's rules. However, in Schmidt it was also found that the employee in question was ordered to appear before the Board. This finding of compulsion is an essential element of a Section 111.70(3)(a)1 violation inasmuch as the Commission has since concluded that no finding of illegal interference is warranted if the employee is given the choice of foregoing the advantages of a meeting to which he is not contractually or statutorily entitled or enduring the disadvantages of meeting without union representation. 4/ Given the critical nature of the question of compulsion, the undersigned turns to an examination of what the instant record reveals in this regard.

Complainant Balli's supervisor credibly testified that Balli was told that he did not have to attend the Board of Inquiry hearing. Complainant Balli testified that he did not remember his supervisor making any statement as to whether he was or was not required to appear.

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1/ City of Milwaukee 13558-C (5/76).

2/ City of Milwaukee 14394-A (9/77 decision of Examiner Malamud currently on appeal before the Commission).


3/ Section 111.70(3)(a)1 states: "It is a prohibited practice for a municipal employer individually or in concert with others to interfere with, restrain, or coerce municipal employees in the exercise of their rights guaranteed in sub (2). Section 111.70(3)(c) states: "It is a prohibited practice for any person to do or cause to be done on behalf of or in the interest of municipal employers or municipal employees, or in connection with or to influence the outcome of any controversy as to employment relations, any act prohibited by par.(a) or (b)".

4/ Waukesha County 14662-B (3/78), also see State of Wisconsin 15716-C (10/79).

Indeed his decision to appear before the Board seems to have been based upon his feeling that it was important to attend a meeting which might have an impact on his job security. Upon learning that he could not have union representation, Complainant Balli entered the hearing room following a beckoning move of the hand from someone within said room. Based upon the foregoing the Examiner concludes that Complainant was not ordered by his supervisor to attend the Board and was not compelled to appear before the Board after he learned that he would not be afforded union representation. 5/ This conclusion requires that the allegation of illegal interference and the derivative Section 111.70(3)(c) allegation be dismissed.

Dated at Madison, Wisconsin this 18th day of January, 1980.

By

  
Peter G. Davis, Examiner

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5/ Both parties argued about whether the management promulgated rules which established the Board of Inquiry required that Complainant Balli appear. The undersigned found the rules to be inconclusive on that question and thus relied exclusively upon the testimony surrounding the instant Board hearing when making this finding.