

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KENOSHA COUNTY ASSISTANT
ATTORNEYS ASSOCIATION,

Complainant,

vs.

JOHN LANDA,

Respondent.

Case XXXI

No. 25223 MP-1043

Decision No. 17384-A

Appearances:

Mr. Gary M. Williams, Attorneys at Law, P.O. Box 421, 12065
W. Janesville Road, Hales Corners, Wisconsin 53136, appearing
on behalf of the Complainant.
Mr. John Landa, District Attorney, Kenosha County Courthouse,
Kenosha, Wisconsin 53140, appearing pro se 1/
Lindner, Honzik, Marsack, Hayman & Walsh, S.C., by Mr. James S. Clay,
700 North Water Street, Milwaukee, Wisconsin 53202, appearing
on behalf of Kenosha County as a party in interest.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

JAMES D. LYNCH, EXAMINER: A complaint of prohibited practices having been filed with the Wisconsin Employment Relations Commission on October 17, 1979 alleging that Respondent had committed certain prohibited practices within the meaning of Section 111.70, Wis. Stats; and the Commission appointed James D. Lynch as Examiner on October 30, 1979 to make and issue Findings of Fact, Conclusions of Law and Order; hearing on said complaint was held on January 22 and 23, 1980 at Kenosha, Wisconsin following which post-hearing briefs were filed with the Examiner by April 21, 1980; and having considered the evidence, arguments of the parties and being fully advised in the premises, the Examiner hereby makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Kenosha County Assistant Attorneys Association, hereinafter referred to as the Union, is the certified exclusive bargaining representative of all legal professional employees, employed by the County of Kenosha, including inter alia, all assistant district attorneys. William Koos was at all times material hereto employed by the County of Kenosha as an assistant district attorney and as such was included in the bargaining unit described above. Frederick L. Zievers was at all times material hereto the authorized grievance representative of the Union.

1/ Brookhouse, Brookhouse & Fennema, 2215 - 63rd Street, Kenosha, WI 53140 by Mr. Eugene Brookhouse, filed a post-hearing brief on behalf of Respondent Landa.

2. John Landa, hereinafter referred to as Landa, was at all times material hereto the elected district attorney of the County of Kenosha. Landa functions as the supervisor of assistant district attorneys employed by the County of Kenosha. Landa is designated by the county as its first step grievance representative pursuant to the terms of the collective bargaining agreement. While functioning in his capacity as a supervisor of employees within his department, Landa was acting within the scope of his express and implied authority as an agent of the County.

3. The County of Kenosha, hereinafter referred to as the County, is a political subdivision of the State of Wisconsin and maintains its offices at Kenosha, Wisconsin. The County employs Charles Rude as its Director of Labor Relations and Personnel. Rude is designated as the County's second step grievance representative by the terms of the collective bargaining agreement existing between it and the Union.

4. The County and the Union, at all times material hereto, were parties to a collective bargaining agreement covering the wages, hours and working conditions of legal professional employees of the County. The agreement provides, inter alia for a procedure for the processing of grievances filed by employees, for notice to the Union in the case of the discipline and dismissal of an employee, and that just cause must exist for the dismissal of an employee.

5. On August 21, 1979, Landa sent a memo to Koos requesting that Koos resign from his position of assistant district attorney. The memo cited certain unspecified work deficiencies as the reason for Landa's request. The memo notified Koos that should he fail to receive such a letter, Koos would be terminated from his position on September 11, 1979. No copy of this letter was ever tendered to the Union by Landa.

6. At no time did Koos submit a letter of resignation to Landa.

7. On September 11, 1979, at the end of the business day, Landa informed Koos and Zievers that effective immediately Koos was dismissed from his employment. Despite requests by Koos and Zievers, Landa refused to discuss the reasons for his action unless Koos tendered a letter of resignation. Landa indicated that his action was being taken pursuant to Chapter 59, Wis. Stats., and then stated that he was not going to say anything at that time which "could be used against him down the road."

8. On September 20, 1979, complainant filed numerous grievances with Landa and other officials of the County alleging, inter alia, that Koos' dismissal was not for just cause.

9. Landa refused to discuss these grievances with Zievers and failed to respond to these grievances in writing although both afore-said actions were required by the terms of the collective bargaining agreement.

10. On September 28, 1979, having received no response to the grievances from Landa, Zievers sent a letter to Rude requesting that the grievances be moved to Step 2 of the grievance procedure in light of Landa's inaction.

11. On October 5, 1979, Rude held a meeting with Zievers to discuss the grievances. During this meeting, Rude presented to Zievers a letter which was denominated as the County's second step reply to the grievances. This letter sustained the grievances in part and ordered that Koos was to be restored to his former position of assistant district

attorney without loss of seniority and with full back pay from September 11, 1980. This disposition of the grievances was subsequently affirmed by the County's Personnel Committee.

12. Koos received notice of the County's settlement of the grievances on October 5, 1979. Thereafter, on October 8, 1979, he reported for work but he was not allowed to return to his duties by Landa. On several occasions thereafter he reported for work and was turned away by Landa. To date he has not been allowed to resume his position of assistant district attorney despite the terms of the settlement agreement.

13. Since October 8, 1979, Landa has refused and continues to refuse to permit Koos to return to his position. Further, Landa has refused and continues to refuse to sign Koos' pay slips, so that Koos might be paid in accordance with the terms of the settlement agreement.

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

CONCLUSIONS OF LAW

1. Complainant Kenosha County District Attorneys Association is a labor organization within the meaning of Section 111.70(1)(j), Wis. Stats.

2. Respondent John Landa is a supervisor within the meaning of Section 111.70(1)(o), Wis. Stats. Landa by virtue of his exercise of this supervisory authority on behalf of the County of Kenosha was acting as an agent within the scope of his authority, express or implied within the meaning of Section 111.70(1)(a), Wis. Stats.

3. Kenosha County is a Municipal Employer within the meaning of Section 111.70(1)(a), Wis. Stats.

4. The position of assistant district attorney is properly included in the legal professional employees bargaining unit.

5. The second step grievance settlement of Koos' grievances by the County is a legally enforceable collective bargaining agreement for the purposes of Section 111.70(3)(a)(5), Wis. Stats.

6. Landa, by refusing to discuss the grievances with Zievers and refusing to make a written response to the grievances as required by the terms of the collective bargaining agreement, has committed prohibited practices within the meaning of Section 111.70(3)(a)(5), Wis. Stats.

7. Landa, by refusing to reinstate Koos pursuant to the County's second step grievance settlement, has committed prohibited practices within the meaning of Section 111.70(3)(a)(5), Wis. Stats.

8. Landa, by refusing to sign Koos' time sheets in order that he might be paid in accordance with the terms of the settlement agreement, has committed prohibited practices within the meaning of Section 111.70(3)(a)(1), Wis. Stats.

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

ORDER

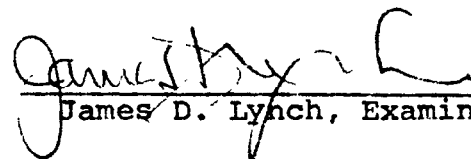
IT IS ORDERED that Respondent John Landa shall immediately:

1. Cease and desist from refusing to abide by the terms of the collective bargaining agreement existing between the Kenosha County Assistant Attorneys Association and the County of Kenosha.
2. Cease and desist from refusing to abide by the terms of the second step grievance settlement agreed to by the County of Kenosha.
3. Cease and desist from refusing to sign Koos' time slips for the period beginning September 11, 1979 up to and through the present date.
4. Take the following affirmative action which the Examiner finds will effectuate the purposes of Section 111.70, Wis. Stats.
 - (a) Immediately comply with the terms of the aforementioned settlement agreement by reinstating William Koos to the position of assistant district attorney without loss of seniority or loss of pay for the period beginning September 11, 1979 up to and through the present date.
 - (b) Immediately execute Koos' time slips for the period beginning September 11, 1979 up to and through the present date so that Koos might be paid in accordance with the terms of the settlement agreement.
 - (c) Notify all employees by posting in conspicuous places where employees work, copies of the notice attached hereto and marked "Appendix A" which notice shall be signed by John Landa, District Attorney of the County of Kenosha, and shall be posted immediately upon receipt of a copy of this order and shall remain posted for sixty (60) days thereafter. Reasonable steps shall be taken by the County of Kenosha to insure that said notices are not altered, defaced or covered by other material.
 - (d) 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 2nd day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


James D. Lynch, 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 Municipal Employment Relations Act, I hereby notify County employees that:

1. I WILL comply with the terms of the collective bargaining agreement entered into between the Kenosha County Assistant Attorneys Association and the County of Kenosha
2. I WILL comply with the terms of the October 5, 1979 settlement agreement entered into by the County of Kenosha.
3. I WILL immediately reinstate William Koos to the position of assistant district attorney and will immediately execute Koos' time slips for the period beginning September 11, 1979 up to and through the present date so that he may receive a sum of money equal to the money he would have earned, including all benefits, had he been reinstated pursuant to the grievance settlement agreement.
4. I WILL NOT in any other or related matter interfere with the rights of County employees, pursuant to the provisions of the Municipal Employment Relations Act.

By _____
John Landa, District Attorney

Dated this _____ day of _____, 1980.

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

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Introduction

The facts are hereafter recited briefly. John Landa, District Attorney of Kenosha County, terminated William Koos from his employment as an assistant district attorney on September 11, 1979. Landa cited certain unspecified work deficiencies as the grounds for his action. Koos was included in the bargaining unit of all legal professional employees of the County of Kenosha represented by the Kenosha County Attorneys Association. The Union and the County were at all times material hereto parties to a collective bargaining agreement covering wages, hours and conditions of employment of legal professional employees.

Grievances protesting Koos' discharge alleging, among other things, that the discharge was not for just cause were filed by the Union. Landa refused to respond to these grievances although he was required to do so by the contract as the County's step one grievance representative. The grievances were then advanced to the second step of the grievance procedure where Charles Rude, County Director of Labor Relations and Personnel, found that just cause for the discharge did not exist and ordered that Koos should be reinstated to his former position without loss of pay or seniority. Thereafter, Koos attempted to resume his position but was not allowed to do so by Landa. At all times material hereto, Koos has stood ready, willing and able to perform his duties. Further, Landa has refused to sign Koos' time slips thereby preventing him from being paid in accordance with the terms of the County's settlement agreement.

DISCUSSION

Respondent Landa's Position

First, Landa argues that as an elected county official he may not be bound by the terms of the collective bargaining agreement. Next, he alleges that he possesses the unfettered right of removal over assistant district attorneys which he contends is granted to him by virtue of Sections 59.45, 17.10(6) and 17.10(7), Wis. Stats. He argues that inasmuch as the just cause for discharge provision contained in the collective bargaining agreement purports to limit this alleged unlimited statutory removal powers there exists an irreconcilable conflict between these provisions and, therefore, the contract and the subsequent grievance settlement is void and unenforceable.

Complainant Union's Position

The Union argues that the provisions of the collective bargaining agreement are enforceable against the District Attorney as he is an agent of the County. It argues that the County's second step settlement of the grievances is a binding collective bargaining agreement which must be given full force and effect. It denies that the just cause provision of the collective bargaining agreement unlawfully limits any removal powers granted to the district attorney by statute.

Position of Kenosha County

The County of Kenosha contends that the just cause provision of the collective bargaining agreement may lawfully modify the removal

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power of the district attorney granted to him as a concomitant of his power to appoint vested by virtue of Section 59.45. The County argues that the second step settlement agreement is a valid collective bargaining agreement which is binding upon the parties and upon Landa as an agent of the County. The County denies that Sections 17.10(6) and 17.10(7) are applicable to the instant case.

Obligation of Elected Officials

Initially, Landa's argument that elected County officials may not be bound by the terms of a collective bargaining agreement covering the terms and conditions of employment of employees within his department has again been rejected by the Commission. 2/ This case presents no sound reason which would warrant departing from such precedent. Thus, this argument is dismissed. Further, when an elected official functions in a supervisory capacity over municipal employees, he is acting as an agent of the Municipal Employer and is thereby bound by the terms of the agreement. 3/

Validity of the Contract and Settlement Agreement

It is well-established that a collective bargaining agreement will be given effect unless its provisions are illegal 4/ or are in such irreconcilable conflict with other statutory provisions that the two may not be harmonized. 5/

It is also well-founded that a grievance settlement agreement is an enforceable collective bargaining agreement unless its terms would violate the previously mentioned strictures. 6/ Therefore, absent such illegality or fatal conflict the terms of the agreement will be enforced.

As noted previously Landa contends that the requirement that removal must be for just cause is void because it is in conflict with that which he alleges is his unfettered right of removal granted him by means of Sections 17.10(6), 17.10(7) and 59.45, Wis. Stats.

2/ Teamsters Local No. 662 v. Chippewa County and Wesley A. Pederson, No. 17328-B (5/80) (Elected County Sheriff is bound by the terms of the collective bargaining agreement).

3/ Id.

4/ WERC v. City of Neenah, 75 Wis. 2d 602 (1977).

5/ Id.; Glendale Prof. Policemen's Assoc. v. City of Glendale, 83 Wis. 2d 90 (1978).

6/ Oneida County Employees Union Local 79 v. Oneida County and Wallace Sommers, No. 15374-B (12/77); affd. No. 15374-C (6/78).

With respect to Section 17.10(7), a review of its provisions indicates that its application is limited to those circumstances in which employment is governed by the terms of a civil service ordinance. 7/ As such, it is clearly inapposite to the instant case and Respondent's reliance thereon is misplaced.

Turning then to Section 17.10(6), it provides in pertinent part:

(6) Others. All other appointive county officers, by the officer, or body that appointed them, at pleasure, except probation officers and their substitutes appointed pursuant to ch. 48 who may be removed for cause only. Removals by a body, other than the county board, consisting of 3 or more members may be made by an affirmative vote of two-thirds of all the members thereof.

While Landa contends that assistant district attorneys are county officers within the meaning of this section who may therefore be removed at his pleasure, he presents no authority in support of that proposition. Rather a review of the authorities when coupled with an examination of the duties performed by assistant district attorneys establishes that assistant district attorneys do not possess the requisite functions of sovereignty so as to require the conclusion that they are county officers rather than employees. 8/ Thus, as Section 17.10(6) is inapplicable, it can not be said to confer the existence of an unfettered right to remove assistant district attorneys from their employment.

7/ Section 17.10(7) provides:

"But no county officer appointed according to merit and fitness under and subject to a civil service law, or whose removal is governed by such a law, shall be removed otherwise than as therein provided."

8/ See Martin v. Smith, 239 Wis. 314, 332 (1941) wherein the court stated:

"...to constitute a position of public employment a public office of civil nature, it must be created by the constitution or through legislative act; must possess a delegation of the sovereign power of government to be exercised for the benefit of the public; must have some permanency and continuity, and not be only temporary or occasional; and its sources and duties must be derived from legislative authority and be performed independently and without the control of a superior power, other than the law, exception in the case of inferior officers specifically placed under the control of a superior officer or body, and be entered upon by taking an oath and giving an official bond and be held by virtue of a commission or other written authority."

(president of university of Wisconsin is an employee not a public officer). Note also that Section 59.45 provides in part that:

"...(n)o assistant district attorney... shall be required to give an official bond."

8/ (Continued)

See also: Hefferman v. City of Janesville, 248 Wis. 299 (1946) (police patrolman not a public officer); Sieb v. Racine, 176 Wis. 617 (1922) (city superintendent of schools not a public officer); in Re Nagler, 194 Wis. 437 (1927) (State conservation department director not a public officer).

Finally, see, Chapter 59.13(1), Wis. Stats., which is concerned with official oaths and bonds of county officers, and which specifically enumerated the following positions which it deems to be county officers: county clerk, county treasurer, sheriff, coroner, clerk of circuit court, district attorney, register of deeds, surveyor and county abstractor. The omission of assistant district attorneys from this list is highly probative of the legislature's intention as regards those whom it considers to be county officers.

Thus, attention must be turned to Section 59.45. Section 59.45 provides:

"The district attorney, except in counties having a population of 200,000 or more, may, when authorized by the County board by a majority of all of its members, appoint one or more assistant district attorneys and a stenographer and a clerk to aid him in the performance of his duties. Such assistant district attorneys shall be attorneys admitted to practice law in this state. The assistant district attorneys so appointed may perform all the duties of the district attorney. No assistant district attorney shall be required to give an official bond."

While this section by its terms is silent as to removal, the Examiner finds that the power to appoint granted to the district attorney, of necessity, implies a concomitant power to remove. However, inasmuch as the power to remove is implied it can not be said to be absolute on its face. Therefore, this implied right of removal may be validly modified by means of a negotiated just cause provision requiring that dismissal shall only be for just cause. Such a construction harmonizes these provisions and gives meaning to both sources. 9/

Therefore, insofar as the just cause provision contained in the contract and enforced by means of the County's second step grievance settlement is not barred by law, it is enforceable against the district attorney. Accordingly, the Examiner hereby orders Landa to cease and desist from violating both and to immediately comply with same.

Refusal to Process Grievance

As noted earlier, Landa refused to discuss the Koos' grievances and to make written responses thereto as the County's designated first step grievance representative although required to do so by the terms of the contract. His conduct in this regard is both a violation of the collective bargaining agreement and of the contractual duty to bargain. 10/ Accordingly, the Examiner hereby orders Landa to cease and desist from such refusals and to comply with the terms of the agreement in this regard in this case and henceforth.

Refusal to Sign Pay Slips

As noted earlier, Landa refused to sign Koos' pay slips thereby preventing compliance with and frustrating the terms of the settlement agreement providing that Koos should not suffer any loss in pay as a

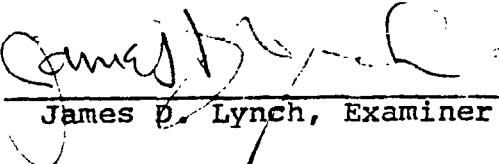
9/ City of Glendale, supra n. 5.

10/ Milwaukee Board of School Directors, No. 15825-B (6/79); Prentice School District, No. 16925-B (1/80).

result of Landa's wrongful discharge of Koos from his employment. This action is inherently destructive to the free exercise of employe rights guaranteed by the provisions of the Municipal Employment Relations Act in that it tends to undermine the faith of the employes in the bargaining process and thereby constitutes unlawful interference within the meaning of Section 111.70(3)(a)(1). Accordingly, the Examiner hereby orders Landa to execute the pay slips in accordance with the order entered herein and to henceforth cease and desist from any activity which would interfere with the free exercise of employe rights guaranteed by the law.

Dated at Madison, Wisconsin this 2nd day of September, 1980.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
James D. Lynch, Examiner