

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANKLIN P. OSWALD and
MADISON PROFESSIONAL POLICE
OFFICERS ASSOCIATION,

Complainants,

vs.

CITY OF MADISON (Police Department)

Respondent

Case LXVII
No. 25115 MP-1024
Decision No. 17645

Appearances:

Mr. Jack McManus, Attorney at Law, for the Complainants.
Mr. Timothy C. Jeffery, Director of Labor Relations, for the
Respondent.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Franklin P. Oswald, herein Complainant Oswald, having filed a complaint with the Wisconsin Employment Relations Commission on September 11, 1979, alleging that the above-named Respondent had committed a prohibited practice 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 pursuant to Section 111.07(5), Stats., and hearing on said complaint having been held before the Examiner in Madison, Wisconsin, on December 6, 1979, and during said hearing the Examiner having granted Madison Professional Police Officers Association's motion to intervene as a party Complainant; and the parties having filed briefs until February 4, 1980, the Examiner, having considered the evidence and arguments of the parties, makes the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Complainant Oswald is employed as a Sergeant in the City of Madison's Police Department and is represented for the purposes of collective bargaining by the Madison Professional Police Officers Association, herein Complainant Association.
2. City of Madison, herein Respondent, is a municipal employer which employs Chief David Couper, Inspector Edward E. Daley, and Captain Morlynn Frankey as supervisory personnel within its Police Department.
3. At all times material herein, Complainant Oswald was an active member of Complainant Association which strongly opposed certain aspects of Chief Couper's administration of the Police Department. In December, 1974, Complainant Oswald was reassigned by Chief Couper to a position and shift which Oswald found undesirable. Prior to said reassignment, Complainant Oswald had been one of seven police officers to sign a complaint against Chief Couper which subsequently led to proceedings before the City of Madison's Police and Fire Commission regarding Chief Couper's conduct. Complainant Oswald grieved the reassignment as being violative of the collective bargaining agreement then

existing between Respondent and Complainant Association. His grievance was subsequently sustained by Arbitrator Joseph B. Kerkman who concluded that Respondent had not considered Complainant Oswald's seniority when making the reassignment.

4. On or about October 17, 1978, Police Officer Balistreri, through a letter from his legal counsel, filed a complaint with Chief Couper regarding conduct of Captain Frankey which was allegedly violative of departmental regulations. Said letter referred to several incidents including one which Complainant Oswald was alleged to have witnessed. The Balistreri complaint had the moral and financial support of Complainant Association. Then existent departmental regulations 6-503.4, 6-506 and 2-1834 stated the following:

6-503.4 The Investigation of Complaint Against a Member of the Department by a Citizen or by Another Member of the Department

- a. Commanding officers are responsible for the investigation of conduct coming to their attention regarding violations of policy, procedures, law or orders by members of the Department.
- b. Complaint numbers are not needed for investigating internal disciplinary matters, not involving a citizen complaint.
- c. Investigative procedures shall be in keeping with the best current practices of the police service.
- d. During an interview with an employee, the employee is entitled to representation if requested and if the employee has reasonable grounds to believe that the interview may be used to support disciplinary action against him/her.
- e. The commanding officer shall conduct a complete investigation within thirty (30) days of the receipt of a citizen's verified complaint unless an extension of this time for good reason is granted by the Chief. Investigations of internally generated complaints should be conducted within a reasonable period of time. In the event that a complaint involves employees of different divisions, bureaus or sections, the respective commanding officers will conduct a mutual investigation of the involved incident and submit a mutual report to the Chief of Police. No later than thirty (30) days after a verified complaint has been made, the commanding officer shall notify the employee in writing of the charges, if any, and send a copy of all investigative materials to the Chief of Police. The commanding officer shall forward the report of the investigation with his/her conclusions of fact and shall indicate whether or not disciplinary action is warranted to the Chief of Police.

- f. When a complaint is associated with an investigation or case pending before another jurisdiction, the department's role will be reviewed by the Chief of Police before proceeding. If the Chief decides to temporarily abate a complaint investigation, the complainant will be so notified; however, the fact that charges may be pending against a complainant or an employee shall not be allowed to affect the acceptance of a complaint.
- g. After a review of the investigation and pre-determination hearing with the employee, conducted by the Chief and/or his designee, the Chief of Police may take disciplinary action.
- h. A copy of the final disposition of any disciplinary action shall be placed in the employee's personnel file.
- i. The employee(s) complained of and the complainant(s) shall be informed of the decision by the office of the Chief of Police within a reasonable period of time.

6-506. Members of the Department are directed to follow the procedures established in this policy and to cooperate with the investigation process. Failure to do so may result in disciplinary action.

2-1834. Members of the Department must cooperate in any official internal investigation of alleged misconduct, illegal activity or impropriety. Failure to answer questions or submit to proper investigative techniques constitutes insubordination.

- 5. On October 20, 1978, Inspector Daley, Captain Frankey's commanding officer, phoned Complainant Oswald and asked him to come to Daley's office to be interviewed as part of the departmental investigation of the Balistreri complaint. Complainant Oswald expressed a willingness to cooperate with the investigation but asked that he be allowed to have legal counsel or a representative of Complainant Association present during the interview. Complainant Oswald's request for representation was based upon his belief that in light of his involvement in past conflicts with Chief Couper, there was a potential for some disciplinary action being taken against him as a result of his involvement with the Balistreri complaint. Complainant Oswald also had some suspicions about the integrity of the investigative process due to the fact that Inspector Daley and Captain Frankey were close personal friends. Inspector Daley informed Oswald that he would respond to Oswald's request in the near future. Fifteen minutes later, Inspector Daley called again and asked Oswald to get representation and come to Daley's office. Complainant Oswald subsequently arrived at Daley's office with Police Officer Richard Daley, a member of Complainant Association's Board of Directors. After some discussion regarding the content of department regulations 6-503.4d, 6-506 and 2-1834, and the validity of Complainant Oswald's perceived need for representation, Inspector Daley informed Complainant Oswald that he would prefer charges of insubordination against Oswald if Oswald continued to refuse to be interviewed without representation. Complainant Oswald then

participated in the interview under protest but without a union representative or lawyer present.

6. On October 31, 1978, Inspector Daley asked Complainant Oswald to review the transcript of the October 20 interview, make any corrections, and sign same. Complainant Oswald again requested that an attorney or union representative be present and Inspector Daley again indicated that Oswald would be charged with insubordination if he insisted upon having a representative present. The meeting then ended. On or about November 7, 1978, Complainant received the following document from Inspector Daley:

On Friday, October 20, 1978, we met for the purpose of your providing me with a statement relating to a complaint filed by Police Officer Robert Balistreri against Captian Morlynn M. Frankey. Your statement was subsequently transcribed and arrangements were made on Tuesday, October 31, 1978, for you to review, amend, delete, or otherwise correct your statement.

On Tuesday, October 31, 1978, you appeared in the company of Detective Supervisor Roth Watson. At that time, I indicated I wished to conduct our meeting without the presence of Detective Supervisor Roth Watson, who, you indicated, was your representative. I also advised you that I could see no way in which the meeting could be used to support disciplinary action against you. Unfortunately, you refused to cooperate with my request.

You are hereby ordered to meet with me on Thursday, November 9, 1978, at 3:00 P.M., by yourself, for the purpose of reviewing your transcribed statement. Your cooperation in this matter is essential to the proper investigation of Police Officer Balistreri's complaint. Your failure to cooperate will result in my complaint against you, which may result in disciplinary action.

7. On November 9, 1978, Complainant Oswald reported to Inspector Daley's office without representation and reviewed the transcript of the October 20 interview. Complainant Oswald also gave Inspector Daley the following document.

I am in your office alone as the result of your written order of 11/7/78. The reason being to review my transcribed statement of 10/20/78 regarding the Officer Robert Balistreri vs. Captain Morlynn Frankey matter.

On 10/31/78, I was called by you to your office for the same purpose. At that time, D/S Roth Watson, Madison Professional Police Officers Association Vice-President, appeared with me in your office. On that date you advised me that you would not proceed while D/S Watson was present. At that time I explained to you that I had requested D/S Roth Watson to be in your office with me for advise as well as being a witness and I went on to explain to you

that I considered this a very delicate investigation. This being due to the fact that I gave a statement to Officer Robert Balistreri's attorney (Atty Jack McManus) against Captain M. Frankey, and that I was very concerned about repercussions against myself due to the statement I gave against a Captain, even though it was an honest and truthful statement.

As stated to you on 10/31/78, I based my fear of repercussions on the fact that I had, in the past, testified against Chief of Police David Couper. As a result of that testimony, I had to get a court order and also win an arbitrator's award to keep from being placed on a grave yard shift although I had 17 years of police service at the time. (This I know the administration will never admit to, but it still remains a fact that it did happen)

On 10/20/78, it was also brought to your attention by MPPOA Board Director, Off. Richard Daley, that another reason for my wanting representation was due to the fact we could not see any objectivity to this investigation. This fact being that you (Inspector Daley) were investigating Captain Frankey and that you two are, at very least, close friends.

Now, because and only because of your written order, I am here to fully cooperate with this investigation. Even though my full cooperation will be extended, I am here under protest. (As I also stated to you on 10/20/78) due to the fact that your written order ordered me to be here alone without representation. My protest is based on the fact that you are violating my constitutional rights mainly my sixth amendment rights as well as state labor law and Department regulations, namely 6-503.4(d) and that I fully intend to pursue this matter.

8. On October 20, 1978, and November 9, 1978, Complainant Oswald did not have reasonable cause to believe that his participation in the Respondent's investigation of the Balistreri complaint could lead to disciplinary action being taken against him by Respondent.

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

CONCLUSIONS OF LAW

1. Respondent City of Madison did not interfere with, restrain or coerce Complainant Franklin P. Oswald in the exercise of rights guaranteed by Sec. 111.70(2), Stats., and therefore, did not commit prohibited practices within the meaning of Sec. 111.70(3)(a)1 Stats., by denying his requests for union representation during the October 20, 1978 and November 9, 1978 meetings with Inspector Daley.
2. Within the context of the instant dispute, the Examiner lacks jurisdiction under the Municipal Employment Relations Act to determine whether Respondent City of Madison's denial of Complainant Oswald's requests for representation violated any constitutional rights possessed by Oswald or any departmental regulation.


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

ORDER

That the instant complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 11th day of March, 1980.

By



Peter G. Davis, Examiner

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MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

Complainants assert that Respondent's denial of Complainant Oswald's request for union representation during his October 20, 1978 and November 9, 1978 meetings with Inspector Daley was violative of Sec. 111.70(3)(a)1, Stats. 1/ In Waukesha County (144662-AB) 3/78, the Commission concluded that Sec. 111.70(2) provides an employee with a statutory right to union representation during involuntary contacts with supervisory personnel which the employee has reasonable cause to believe could result in disciplinary action being taken against him. Said conclusion is based upon a finding that in the foregoing circumstances, the employee has strong interests at stake which may be well served by a union representative's potential ability to affect decisions about whether or how to discipline an employee. Application of the foregoing principles to the instant dispute reveals that the propriety of Respondent's undisputed denial of Complainant Oswald's request for union representation hinges upon whether Oswald had reasonable cause to believe that his meetings with Inspector Daley could result in disciplinary action being taken against him. 2/ The undersigned thus turns to examination of this question.

Complainants contend that given (1) past reprisals by Respondent against Oswald for having initiated proceedings against Chief Couper, (2) the friendship between Inspector Daley and Captain Frankey, (3) the hostility which exists between management and Complainant Association, and (4) Daley's hostile conduct during meetings, Complainant Oswald could reasonably fear that discussions with Daley about Oswald's involvement in the Balistreri complaint could yield disciplinary action. Initially, it should be noted that while it is clearly the heartfelt opinion of Complainants that the attempted transfer in 1974 was a disciplinary reprisal and that Daley's friendship with Frankey tinged the investigation of the Balistreri matter, such opinions do not constitute evidence upon which factual findings can be based. The evidence in the record does reveal (1) that Complainant Oswald was intimately involved in the initiation of proceedings against Chief Couper before the Police and Fire Commission; (2) that Chief Couper's subsequent attempt to transfer Oswald ran afoul of the

- 1/ During the hearing the Examiner granted Respondent's motion to dismiss Complainant's allegation that Respondent had violated departmental regulations and Oswald's constitutional rights by denying his request for union representation. Said action was based upon the Examiner's belief that he lacked jurisdiction under MERA to make such determinations when resolving the allegation of illegal interference. In their brief, Complainants appear to have abandoned their interest in having the Examiner make findings about violations of constitutional rights or departmental regulations. Thus no further discussion of the issue is warranted.
- 2/ The "reasonableness" of the employee's belief is measured by objective standards under all the circumstances. This standard was adopted by the U.S. Supreme Court in NLRB v. Weingarten, 420 U.S. 251(1975) and utilized by the Commission in Waukesha County.

seniority provisions of the applicable bargaining agreement; (3) that the relationship between Chief Couper and Complainant Association has been marred by continuing conflict; (4) that Daley and Frankey are good friends; and (5) that Daley would have pursued charges of insubordination against Complainant Oswald if Oswald had continued to refuse to participate in the investigation unless a representative of Complainant Association was present. This latter fact provides no support for the reasonableness of Oswald's fear inasmuch as any hostility which Daley evidenced during the two meetings was generated by Oswald's insistence on representation and not by Oswald's involvement in the Balistreri matter. While one could infer from the record that Chief Couper's 1974 effort to transfer Complainant Oswald was a disciplinary reprisal 3/ and that Inspector Daley's investigation of Frankey might be influenced by friendship, said inferences are not strong enough to meet the objective test of reasonableness which the Examiner must apply. It is therefore concluded that Complainant Oswald lacked reasonable cause to believe that his meetings with Inspector Daley could lead to disciplinary action, and thus that Respondent's denial of Complainant Oswald's requests for union representation was not violative of Sec. 111.70(3)(a)1, Stats.

Dated at Madison, Wisconsin this 11th day of March, 1980.

By



Peter G. Davis, Examiner

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- 3/ It is noteworthy that when Complainants challenged the validity of the transfer attempt through the grievance arbitration process, there is no evidence that they made any allegations that the transfer was a disciplinary reprisal.