

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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JAMES PARLOW and NON-SUPERVISORY	:	
POLICE ASSOCIATION,	:	
	:	
Complainants,	:	
	:	Case 182
vs.	:	No. 42808 MP-2268
	:	Decision No. 26546-B
CITY OF LA CROSSE, CHIEF OF	:	
POLICE BRUCE MARCO AND PERSONNEL	:	
DIRECTOR JEROME RUSCH,	:	
	:	
Respondents.	:	
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Appearances:

Davis, Birnbaum, Joanis, Marcou & Colgan, Attorneys at Law, by Mr. James G. Birnbaum, Community Credit Union Building, 2025 South Avenue, Suite 200, P.O. Box 1297, La Crosse, Wisconsin 54602-1297, appearing on behalf of the Complainants.

Klos, Flynn & Papenfuss, Attorneys at Law, by Mr. Jerome Klos, 800 Lynne Tower Building, 318 Main Street, P.O. Box 487, La Crosse, Wisconsin 54602-0487, appearing on behalf of the Respondents.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amedeo Greco - Hearing Examiner: Police Officer James Parlow and the Non-Supervisory Police Association, herein Complainants, filed a prohibited practices complaint with the Wisconsin Employment Relations Commission on September 15, 1989, alleging that the City of La Crosse, Chief of Police Bruce Marco, and then Personnel Director Jerome Rusch, herein Respondents, had committed prohibited practices within the meaning of Sec. 111.70, Wis. Stats. by unilaterally adopting rules governing outside employment and by discriminating against Parlow because he engaged in concerted protected activities. This matter was subsequently held in abeyance pending unsuccessful efforts to informally resolve it. Thereafter, the Commission on July 9, 1990, appointed the undersigned to issue Findings of Fact, Conclusions of Law and Order.

Respondents on March 19, 1990, filed a Motion to Make Complaint More Definite and Certain and on May 1, 1990, they filed a Motion to Dismiss Complaint. Pursuant to my directive, Complainants thereafter on April 25, 1990, supplemented their complaint by supplying certain additional information and by spelling out that they were charging Respondents with violating Sec. 111.70(a)(1), (3), (4) and (5), Wis. Stats. By Order dated July 9, 1990, I denied Respondent's Motion to Make More Definite and Certain and Motion to Dismiss Complaint.

Hearing was held in La Crosse, Wisconsin on August 9, 1990, and both parties filed briefs which were received by November 30, 1990.

Having considered the arguments of the parties, the pleadings and the entire record in this matter, I issue the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Non-Supervisory Police Association, herein the Association, is a labor union which represents certain non-supervisory police officers employed by the City of La Crosse, Wisconsin.
2. Complainant James Parlow is employed by the City of La Crosse as a police officer on the fourth shift and he is in the collective bargaining unit

represented by the Association. The fourth shift runs from 7:00 a.m. - 3:00 p.m. and is an overlap of first and second shifts.

3. The City of La Crosse, herein the City, is a municipal employer within the meaning of Sec. 111.70, Wis. Stats. At all times material herein, Bruce Marco has been the Chief of Police and has acted on the City's behalf. At all times material herein and prior to his retirement in 1990, Jerome Rusch served as Personnel Director of the City and acted on its behalf.

4. The City and the Association are privy to a collective bargaining agreement which does not have any provisions relating to outside employment.

5. Article V of said agreement, entitled "Sick Leave," provides inter alia that

accumulated sick leave can be used for any bona fide illness or injury excepting those compensated under the Wisconsin Compensation Act, and except as to injuries or illnesses incurred by employees engaged in any outside employment or business while so engaged in such outside employment or business.

. . .

All sickness or injuries of over three (3) days duration must be verified by a physician's certificate. The City reserves the right of reasonable independent medical examination at City's expense. Such medical examination shall be at the request of the Department Head or Council.

6. Police officers in the collective bargaining unit traditionally have engaged in off-duty employment in order supplement their income, provided that it not conflict with their regular police duties.

7. Article VIII of the contract, entitled "Worker's Compensation," provides that employes are to receive worker's compensation for job related injuries and illnesses and states, inter alia, that:

The Chief of the Police Department, in consultation with the employee's physician, shall determine whether or not such injury and/or illness is within the scope of the proceeding paragraph and thus entitle the employee to full salary pay and shall so state on the report covered in procedure in case of injury on the job.

. . .

8. The City self funds and administers its own worker's compensation plan and, as a result, any benefits paid come directly out of the City's own resources. Personnel Director Rusch at all time material herein was responsible for administering said program. As part of his normal job duties, Rusch would contact an employe's physician to determine the nature and degree of any alleged injury, along with when the employe would return back to duty.

9. On or about November 26, 1987, Parlow suffered a severe work related injury to his shoulder which caused him to miss work, during which time he received worker's compensation under the terms of the collective bargaining agreement. Parlow thereafter on several occasions missed work when his injury flared up again, at which time he again received worker's compensation.

10. Parlow for the last several years has operated an "odd job" construction business and worked as a janitor in a local school and he continued to do so during the time he received worker's compensation benefits.

11. Then City Personnel Director Rusch in May 1989, learned about

Parlow's work as a janitor and by letter dated May 16, 1989 told him that his

"continued part-time employment would not be appropriate with regard to your recovery and, therefore, you must terminate such activities" immediately but that the City would not enforce said order, "In the event that your doctor provides me with a statement . . . saying that those activities do not exacerbate your back, neck and arm injury . . ."

12. Prior to sending said letter, both Rusch and Police Chief Marco had been concerned over how long it was taking Parlow to recover over his 1987 injury and the amount of time that he had missed at work.

13. Parlow thereafter obtained and presented Rusch with a note dated May 19, 1989, from Doctor Neal Taylor which provided: "I have viewed Mr. Parlow's duties at Mt. Calvary School. In my medical opinion these duties are not exacerbating his back or neck symptoms." At the time he wrote said note, Taylor was unaware that Parlow also had another part-time job.

14. On May 23, 1989, Rusch and Marco observed Parlow, who was off-duty and on vacation status, working on a house sawing lumber for a step and lattice work for the bottom of the steps. Rusch questioned Parlow as to what he was doing and said that Parlow only had been cleared by his doctor to work in a school, Rusch also told Parlow that such work "isn't fair to the City"; that the City wanted him to recuperate and get back to work, and that he would have to give up his construction work. Thereafter, Parlow picked up his tools and drove away in his truck. Subsequent thereto, Parlow gave up his construction job, but continued working as a janitor.

15. On May 23, 1989, Parlow sent a memo to Chief Marco stating that he wanted a "letter of clarification" from him regarding the City's position as to whether he could keep working on the house. Parlow also requested information regarding any medical reports the City might have on him, along with any documents pertaining to the City's official policies regarding outside employment.

16. Rusch thereafter, and without Parlow's knowledge or permission, telephoned Dr. Taylor to tell him about Parlow's construction work and then learned that Dr. Taylor did not know anything about it. Dr. Taylor said that in his opinion Parlow should cease such work because it could aggravate his injury.

17. By letter dated May 25, 1989, Marco told Parlow, inter alia, that if Parlow produced a doctor's note stating that it was alright for him to do construction work, "I would reconsider any ban this department has on your part-time employment." This apparently was the first time that the City had ever requested a doctor's note regarding a police officer's off-duty employment.

18. Parlow asked Taylor for a note stating that it was alright for him to continue his construction job. Taylor refused to do so and stated that Parlow could come back for treatment after he resolved his dispute with the City.

19. In August 1989, Parlow saw a sports medicine specialist for an examination and asked for a medical release for construction work, but failed to receive one. Parlow on January 2, 1990, finally obtained a note from another doctor stating that he was, "not restricted in his work duties on or off duty." By letter dated January 5, 1990, Marco informed Parlow that by virtue of said note, "I am lifting the ban on your part-time construction work at this time."

20. By letter dated January 10, 1990, Marco informed Parlow that in light of another doctor's note, he was amending "my letter to you dated January 5, 1990, pertaining to your off-duty work and change the words 'construction work' to 'light duty carpentry work' . . ."

21. Parlow on July 5, 1989, filed a grievance complaining that the City was violating the collective bargaining agreement by attempting to place restrictions on his off-duty employment. The City denied the grievance on the grounds that it was untimely, because it did not refer to any particular section of the contract, and because the City in any event had not violated the contract. Said grievance was never appealed to arbitration.

22. On or about July 14, 1989, Parlow met with shift supervisor Andrew Truscott, at which time they discussed whether Parlow would be able to continue his construction work.

23. Parlow also spoke to and met with Chief Marco, during which time Marco told him that his part-time work was impeding his full recovery and that he would be disciplined if he continued with his construction job.

Upon the foregoing, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. Respondents have not unlawfully refused to bargain with the Association over the limitations they placed on James Parlow's outside employment and they have not violated Sec. 111.70(3)(a)1 or 5, or any other sections, of the Municipal Employment Relations Act.

2. Respondents have not discriminated and/or retaliated against James Parlow because of his concerted protected activities and they have not violated Sec. 111.70(3)(a)3, or any other sections, of the Municipal Employment Relations Act.

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

ORDER 1/

IT IS ORDERED that the Complaint filed in this matter be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 27th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner

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1/ Please find footnote 1/ on page 5.

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

CITY OF LA CROSSE  
(POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF  
FACT, CONCLUSIONS OF LAW AND ORDER

The Association contends that the City acted unlawfully by unilaterally imposing restriction on Parlow's off-duty employment without negotiating same in violation of City of Wauwatosa, Dec. No. 15917 (WERC, 11/77) and City of Waukesha, Dec. No. 17830, (WERC, 5/80). It also claims that the City discriminated and retaliated against Parlow by restricting his off-duty employment because Parlow exercised his contractual right to remain on fourth shift, contrary to Marco's wishes to totally abolish that shift. As proof of that, it asserts that Truscott told Parlow that he would be allowed to keep his odd job business if he relinquished his rights to the fourth shift. The Association claims that even if there were "other factors contributing to the decision" to limit Parlow's outside employment, "so long as one of those factors was motivated by his legitimate exercise of bargaining unit rights, the entire decision is tainted" under Muskego Norway Consolidated Schools - Joint School District vs. Wisconsin Employment Relations Board, 35 Wis.2d. 540, 562, 151 N.W.2d. 617, 628 (1967). As a remedy, the Association requests that Parlow be made whole for any loses he incurred resulting from the City's ban on his outside construction work; that the City be ordered to bargain over its outside employment policies; and that it also be ordered to cease and desist from committing the prohibited practices herein.

The City acknowledges that "Parlow is physically well-endowed, fearless and considered a good police officer by the Department as he has a high record of arrests." However, it maintains that Parlow cannot complain that the City has violated the contract by virtue of its directive that he stop his construction work since his only remedy for that was to file a timely grievance - something he failed to do. The City states that there is no proof that Parlow was discriminated against because of his insistence on staying on the fourth shift; that the City's actions herein were based upon its legitimate interest in administering its Worker's Compensation program; that a past practice supports its position; and that the remedy requested is beyond the Commission's jurisdiction.

In resolving the issues herein, the first item that must be addressed is what this case does not involve: it does not turn upon the broad legal principle of whether the City, as a matter of general policy, has the right to unilaterally regulate the outside employment of its police officers. Indeed, the Association acknowledges that the City under certain circumstances can regulate such employment under the pertinent statutes.

Rather, this case involves the much more narrow question of whether the City can impose reasonable restrictions on outside employment when - based upon reasonable medical evidence - that employment could interfere with the recovery of one of its employes under its Worker's Compensation plan.

Here, the City was legitimately concerned over the length of time Parlow was taking to recuperate from his 1987 injury and his subsequent absences from work, as City funds were being used to compensate him for his injury. That is why it had the right to insist in May, 1989, that Parlow produce a doctor's note stating that his janitorial work did not interfere with his police work and that is why, once it subsequently found out about Parlow's additional construction work a few days later, it had the right to insist that Parlow produce a similar doctor's note regarding his construction work.

For here, Article V of the contract provides that sick leave cannot be used for "injuries or illnesses incurred by employes engaged in any outside employment or business while so engaged in such outside employment or business" and that "All sickness or injuries of over three (3) days duration must be verified by a physician's certificate." The necessary thrust of this language is that the City is not held liable for any non-work related injury and that a doctor's note can be required for lengthy illnesses or injuries. Hence, it follows that the City can inquire about an employe's health condition and

obtain medical clearance for same when his/her off the job activities affect any payment the City is required to make under either the contractual sick leave or worker's compensation provisions.

Furthermore, the record shows that Parlow's off-duty employment did affect his recovery since Dr. Taylor in May, 1989, told Rusch that Parlow's construction work could affect his injury and since Taylor a few days later told Parlow the same thing when he refused to give Parlow a requested note stating the contrary.

It thus was entirely appropriate for Marco to tell Parlow that he was prohibited from working on his construction job until he received a medical release stating that such work would not interfere with the recovery of his work related injury.

As a result, the City did not act improperly in enforcing said ban until such time that Parlow finally produced a satisfactory doctor's note in January, 1990. Once that note was produced, Marco immediately lifted the ban.

It is not clear as why it took Parlow so long to obtain such a medical release. But that was a matter entirely between Parlow and his own private doctors, as the City cannot in any way be held responsible for that delay, one which was entirely out of its own control.

The only possible basis for finding that the ban was improper is the claim that Marco imposed it and refused to lift it because Parlow refused to give up his contractual right to the fourth shift.

Thus, Parlow testified that he met with shift supervisor Andrew Truscott on or about July 14, 1989, at which time Truscott told him that Marco was very vindictive; that the department wanted to do away with the fourth shift; and that if Parlow agreed to go off fourth shift "he (i.e. Truscott) would basically guarantee that all of my problems would sort of go away with my off-duty employment . . . and the other problems that I was experiencing." Parlow added that Truscott then told him, "if anybody asked me about this, I'll say I never said it."

Truscott admits to meeting with Parlow and asking him to give up his fourth shift and to switch to the third shift, something he has also done on several other occasions with both Parlow and the other fourth shift officer. However, Truscott flatly denied making the statements attributed to him by Parlow, testifying "He talked and I listened mainly."

Hence, there is a head on credibility clash between Parlow and Truscott as to what was said in their meeting. Having reviewed their testimony as well as the entire record, I am unable to find that Truscott in fact made the statements attributed to him, as there simply is no way of proving what transpired between the two of them on this occasion.

Accordingly, and since the Association bears the burden of proving that the City unlawfully discriminated against Parlow because of his concerted protected activities, it must be concluded that this complaint allegation also must be dismissed.

Dated at Madison, Wisconsin this 27th day of March, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/  
Amedeo Greco, Examiner