

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MICHAEL SIPEN and	:	
INTERNATIONAL ASSOCIATION OF	:	
FIRE FIGHTERS, AFL-CIO,	:	
LOCAL 257,	:	
	:	
Complainants,	:	Case 324
	:	No. 46576 MP-2546
vs.	:	Decision No. 27135-A
	:	
RICHARD DAVIS, CHIEF, CITY OF	:	
APPLETON FIRE DEPARTMENT,	:	
and CITY OF APPLETON,	:	
	:	
Respondents.	:	

Appearances:

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, P.O. Box 442,
Mr. Greg Carmen, City Attorney, and Mr. James P. Walsh, Assistant City

Milwaukee
Attorney

FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Amedeo Greco: Hearing Examiner: Michael Sipen and the International Association of Fire Fighters, AFL-CIO, Local 257, herein Complainants, filed a prohibited practices complaint with the Wisconsin Employment Relations Commission on November 18, 1991, alleging that Fire Chief Richard Davis and the City of Appleton, herein Respondents, acted unlawfully in refusing to supply Local 257 with certain information; in threatening to remove a union officer from employe Michael Sipen's disciplinary meeting; and by refusing union representation to Sipen in disciplinary meetings in violation of Section 111.70(3)(a)1 of the Municipal Employment Relations Act.

The Commission thereafter appointed the undersigned to make and issue Findings of Fact, Conclusion of Law, and Order as provided for in Section 111.07(5), Wis. Stats. and hearing was held in Appleton, Wisconsin, on February 28, 1992. The parties subsequently filed briefs which were received by April 28, 1992.

Having considered the arguments and the record, the Examiner makes and files the following Findings of Fact, Conclusion of Law and Order.

No. 27135-A

FINDINGS OF FACT

1. Complainant International Association of Fire Fighters, Local 257, herein the Union, is a labor organization within the meaning of Section 111.70(1)(h), Stats. Its mailing address for the purposes of this litigation is the same as its attorneys, Shneidman, Myers, Dowling & Blumenfield, P.O. Box 442, Milwaukee, Wisconsin 53201-0442.

2. Complainant Michael Sipen is a municipal employe within the meaning of Section 111.70(c)(i), Stats., and is employed by the City of Appleton Fire Department as a fire fighter and resides at 956 London Street, Menasha, Wisconsin 54952.

3. At all times material herein, Respondent Richard Davis has served as the Chief of the City of Appleton Fire Department. He is a supervisor within the meaning of Section 111.70(1)(o), Stats. and has acted on behalf of the City of Appleton.

4. Respondent City of Appleton, herein City, is a municipal employer within the meaning of Section 111.70(1)(d), Stats., with its mailing address at 200 North Appleton Street, Appleton, Wisconsin 54912.

5. The Union is the exclusive collective bargaining representative for certain of the City's firefighters and is a party to a collective bargaining agreement with the City which terminated on December 31, 1991.

6. Chief Davis on October 28, 1991, called into his office Union President Leonard Vanderwyst and Union executive board member Neal Cameron and told them that a bargaining unit member had been accused of distributing a copy of the Fire Department entrance examination to employment applicants and that, if true, said accusation constituted theft of City property and could result in severe employment discipline, up to and including termination. Chief Davis also said that he either had been or would be in contact with the City Attorney and the City's police department regarding the matter. Said Union officers then asked for the names of the accused and the accuser, which Davis refused to identify on the ground that there was an ongoing investigation of the matter.

7. In the afternoon of October 28, 1991, Chief Davis - in the presence of Assistant Chief James E. Thiel - directed Vanderwyst and Sipen to report to his office. Just prior to said meeting, Vanderwyst told Sipen that the City was apparently looking into whether Sipen had taken a fire department exam - which Sipen denied. Vanderwyst then also told Sipen to just answer the questions which were asked. Once there, Davis gave Sipen a document - known as the Garrity warning - which Davis read and which, inter alia, stated that Sipen would be disciplined if he failed to answer questions. Sipen at said meeting specifically requested union representation to assist him in answering questions. Davis then stated that Vanderwyst was there only as a "courtesy" and ordered Vanderwyst not to speak and said that if he did, he, Vanderwyst, would be removed from the meeting. During the meeting, Vanderwyst asked - without incident - for the name of the accuser and how Chief Davis knew that an exam was missing.

8. In the afternoon of October 30, 1991, Sipen was engaged in fire fighter training at Lutz Park in Appleton. Assistant Chief Thiel arrived at the training site and ordered Sipen to accompany him to the City of Appleton Police Station for further investigation. Sipen requested union representation and Vanderwyst, who was present at the park, requested the opportunity to accompany and represent Sipen. Union officer Huspek also told Thiel that Sipen had a right to union representation at said interrogation.

9. In response, Thiel stated that Chief Davis had directed him to state that the matter was an administrative investigation and that Sipen did not have any right to union representation. He thus denied Sipen's request for union representation.

10. Sipen accompanied Thiel to the City of Appleton Police Station where police officer Peter Helein, in Thiel's presence, interrogated Sipen regarding the allegations that he distributed the test examination to applicants. In doing so, Helein said that the matter was an administrative investigation and that his answers would not be used against him criminally. Sipen denied said allegations and said that he had only distributed sample questions and answers which he had obtained from a firefighter in a different fire department. Said questions represented the kind of questions regularly

given in firefighter entrance examinations throughout the State of Wisconsin. Sipen also said that he did not earlier tell Chief Davis about the sample test and answers because he was not specifically asked it and because a union representative had told him not to volunteer that fact because Davis would not understand and because things "might get out of hand".

11. Sipen near the beginning of said interrogation asked if the matter was a criminal investigation. Helein denied that it was and said that it was an administrative investigation. Sipen then again requested union representation which Thiel again denied on the ground that Chief Davis had earlier told him, Thiel, that Sipen had no right to union representation. Helein therefore continued his investigation of Sipen in the absence of any union representation. At that time, Helein in an off-the-record discussion confirmed the name of Sipen's accuser.

12. After said meeting concluded, Thiel accompanied Sipen to Sipen's house where he, Sipen, tried unsuccessfully to find the study test. After that, they returned back to the police station; no further interrogations were then conducted.

13. Sipen's requests for union representation were based upon his reasonable belief that said investigations would result in disciplinary action against him. Said requests, if honored, would not have interfered with any legitimate management prerogatives. At no time during any of the aforementioned meetings did any union representatives disrupt or in any other way impede the proper conduct of said investigation.

14. The City ultimately concluded that it did not have sufficient proof that Sipen had taken and distributed actual copies of the Fire Department's firefighter entrance examination and it therefore let the matter drop without disciplining him. At no time did Sipen improperly take or distribute any City property.

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

CONCLUSION OF LAW

Respondents violated Section 111.70(3)(a)1, Stats. in refusing to allow Michael Sipen to have union representation during his disciplinary interviews, and in refusing to allow union representatives to actively participate in said meetings.

On the basis of the above Findings of Fact and Conclusion of Law, the Examiner makes and issues the following

ORDER 1/

Richard Davis and the City of Appleton should immediately take the following action which will effectuate the purposes of the Municipal Employment Relations Act:

1. Cease and desist from:
 - a. Refusing to allow union representation during investigatory meetings involving possible employe discipline.
 - b. Refusing to allow union

representative to offer reasonable input during said meetings.

2. Post the Notice attached hereto as Appendix "A" in conspicuous places in the workplace. The notice shall be signed by a representative from the City of Appleton and shall remain posted for a period of 30 days. Reasonable steps shall be taken to ensure that the Notice is not altered, defaced or covered by other material.
3. Notify the Wisconsin Employment Relations Commission within 20 days of this Order what steps have been taken to comply herewith.

Dated at Madison, Wisconsin this 1st day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner

(Footnote 1/ will appear on the next page.)

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 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.

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, we hereby notify our employes that:

WE WILL allow employes, upon request, to have union representation during investigatory meetings which may reasonably lead to employe discipline.

WE WILL allow union representatives to offer reasonable input at any such meetings.

WE WILL destroy all references to our interrogations of Michael Sipe from our files.

WE WILL cease and desist from interfering with the rights of any of our employes to have union representatives during investigatory meetings which may reasonably lead to employe discipline.

Dated at Appleton, Wisconsin this 1st day of July, 1992.

By _____
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THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.
CITY OF APPLETON (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER

Complainants maintain that Respondents acted unlawfully in violation of such cases as NLRB v. Weingarten 420 U.S. 251, 95 S.Ct. 959, 88 LRRM 2689 (1975) and City of Milwaukee (Dec. No. 14873-B, 14875-B and 14899-B, 8/26,

1980) in interrogating Sipen while refusing to honor his requests for union representation during investigatory meetings which could have resulted in discipline against him. They thus contend that Respondents had no justifiable basis to believe that Union representatives would have disrupted those meetings and that, moreover, said meetings were investigatory rather than "administrative" in nature, as initially claimed by Respondents. Calling this a "flagrant and willful violation of the law", the Union seeks as a remedy a cease and desist order, a notice posting requirement, and the destruction of all references to Sipen's interrogations from the City's files.

In a rare, but refreshing admission of error, Respondent's brief acknowledges that Respondents "violated the rule of representation at the October 30, 1991 interview" when they refused Sipen's request for union representation, but they nevertheless argue that since Sipen was never disciplined, "no remedy is warranted in this case." As to the earlier October 28, 1991 meeting, Respondents argue that they "complied scrupulously with the Weingarten rationale. . ." since they properly limited the Union's involvement at said meeting because they feared that Union representatives would interfere with the investigation.

I disagree. I credit the combined testimony of Sipen and Vanderwyst who testified in substance that Chief Davis at the October 28, 1991, meeting expressly told Vanderwyst that he was there as a "courtesy to Mike" and that if he interrupted the proceedings in any way he would be removed from the room.

For his part, Chief Davis admitted that he used the word "courtesy" and that he told Vanderwyst that he would not be allowed to interrupt the proceeding. However, Chief Davis claimed that, "I don't specifically remember suggesting that I was going to have him removed, no." The parties stipulated that Thiel would have testified the same as Chief Davis had he been called to testify on this point.

I credit the more specific testimony of Sipen and Vanderwyst over that offered by Davis and find that Davis, indeed, did make the statements attributed to him, including his threat to have Vanderwyst removed from the room. Davis thereby violated Sipen's right to be assisted by effective union representation, as it is well-recognized that union representatives at such investigatory meetings have the right to actively participate in order to provide employees with the concerted protection to which they are entitled. Davis prevented that from happening by in effect telling Vanderwyst that he would be kicked out of the room if he spoke.

To be sure, and as the City correctly notes, Vanderwyst did ask one or two questions without suffering any adverse consequences. That, though, is hardly the kind of active participation that Vanderwyst was entitled to give and which Sipen was entitled to receive. Hence, Davis violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act by curtailing Vanderwyst's involvement at the October 28, 1991, meeting.

Furthermore, and contrary to the City's claim, there is absolutely no evidence whatsoever showing that any Union representatives ever interfered in any way with the City's investigation. That being so, there was no justification for its refusal to allow Union representatives to actively participate in the disciplinary meetings herein.

Having thereby twice violated Sipen's rights - first at the October 28, 1991, meeting and then at the October 30, 1991, meeting - I find that the aforementioned remedial order and notice posting requirement are necessary in this case given the Respondent's misconduct.

Conversely, I find no merit to the Union's additional requests for attorney's fees and for a written notice to be sent to each employe spelling out their Weingarten rights. The aforementioned notice will serve the latter purpose.

Dated at Madison, Wisconsin this 1st day of July, 1992.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Amedeo Greco /s/
Amedeo Greco, Examiner