

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

- - - - -  
:   
MILWAUKEE POLICE SUPERVISORS' :   
ORGANIZATION, DENNIS J. FORJAN, :   
and RICHARD WILL, :   
:   
Complainants, : Case 389  
: No. 47564 MP-2605  
vs. : Decision No. 27392-A  
:   
CITY OF MILWAUKEE and PHILIP ARREOLA, :   
CHIEF OF POLICE of the :   
CITY OF MILWAUKEE, :   
:   
Respondents. :   
:   
- - - - -

Appearances:

Gerald P. Boyle, S.C., 1124 West Wells Street, Milwaukee, Wisconsin 53233, by Ms. Judith A. Ogorchock, for the Union.  
Mr. Thomas C. Goeldner, Assistant City Attorney, 200 East Wells Street, Milwaukee, Wisconsin 53202-3551, for the City.

FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

Milwaukee Police Supervisors' Organization, herein, MPSO, on June 4, 1992, filed a Complaint of Prohibited Practices with the Wisconsin Employment Relations Commission in which it alleged the City of Milwaukee, herein, the City, and its agent, Chief Philip Arreola, had committed Prohibited Practices within the meaning of Sec. 111.70 (3) (a) 1 and 5, Stats. On September 14, 1992, the Commission appointed Jane B. Buffett, a member of its staff, to act as Examiner, to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Secs. 111.70(4)(a) and 111.07(5). Stats. Hearing was held on October 22, 1992 in Milwaukee, Wisconsin. A transcript was prepared and received on November 23, 1992. The parties filed briefs, the last of which was received February 8, 1993. The Examiner, having considered the evidence and arguments of the parties, and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee Police Supervisors' Organization, herein, MPSO is a labor organization with offices at P.O. Box 891, Milwaukee, Wisconsin 53201-0891, and is the certified bargaining representative of certain supervisory employes of the Milwaukee Police Department.

No. 27392-A

2. Dennis J. Forjan is a supervisory employe of the Milwaukee Police Department and the President and Grievance Representative of MPSO.

3. Sergeant Richard Will is a supervisory employee of the Milwaukee Police Department and a member of the bargaining unit represented by MPSO.

4. The City of Milwaukee, herein, the City, is a municipal employer with offices at 200 East Wells Street, Milwaukee, Wisconsin 53202.

5. Chief Philip Arreola is Chief of Police for the City.

6. MPSO and the City are signatories to a series of collective bargaining agreements. The 1991-1992 Agreement contained the following relevant provision:

ARTICLE 7  
CONTRACT ENFORCEMENT PROCEDURE

5. STEPS IN THE CONTRACT ENFORCEMENT PROCEDURE

. . .

Step 2.

If the grievance is not resolved in Step 1., above, the MPSO Grievance Representative or his/her designee may, within fifteen (15) days of receipt of the answer from the Inspector of Police, Personnel/Administration, appeal the grievance to the Chief. Failure to appeal said answer within this prescribed period of time shall constitute a settlement of the grievance. Such appeal shall be in writing and therein a request should be made for a meeting between the Chief of Police, the grievant and the MPSO Grievance Representative or his/her designee. At the meeting, to be held at a mutually agreeable time, the parties shall discuss the grievance and the answer and decision in regard thereto in good faith in an attempt to resolve the grievance. Within forty-five (45) days of receipt of the written appeal to the grievance, unless the time period is mutually extended by the parties, the Chief shall, in writing, advise the MPSO Grievance Representatives and the grievant as to the Chief's decision with respect to the grievance. If an MPSO grievance is not settled at the second step, the MPSO may proceed to final and binding arbitration as hereinafter provided.

. . .

7. Sometime prior to September 21, 1991, Sergeant Will came under investigation by the Department's Internal Affairs Division for possible

violations of the Department's residency requirement and the Department's prohibition on conducting a business without permission of the Chief.

8. On September 21, 1991 Will filed a grievance, alleging that he should be awarded the vacant lieutenant position.

9. On December 3, 1991 the parties met and agreed to hold the grievance in abeyance pending the resolution of the disciplinary matter.

10. On December 9, 1991, Will, Forjan, Inspector Walter Franklin of the Internal Affairs Division, Will's commanding officer Inspector Vincent Partipilo, and Arreola met for an "informal hearing" regarding the disciplinary matter. This "informal hearing" is a step the Chief has initiated that occurs after the Chief has received the report of the Internal Affairs Division and prior to the issuance of a discipline. At the meeting, the Chief gives the officer an opportunity to say whatever he would like to say and the officers' commanding officer is given that opportunity. There is no sworn testimony and statements made at the hearing are not recorded.

11. Arreola had no previous personal acquaintance of Will other than that he was a Sergeant in the City Police Department.

12. At the end of the December 9, 1991 meeting, which lasted about an hour, Forjan asked the Chief if Will could speak to him in private regarding a personal sensitive matter that related to the disciplinary meeting. The Chief agreed, and everyone except Will and Arreola left the meeting room. The private meeting lasted approximately fifteen or twenty minutes.

13. In January, 1992, the parties met to review Internal Revenue Service papers that were considered relevant to the disposition of the disciplinary matter. Subsequent to the meeting, Arreola determined to terminate Will pursuant to the residency violation.

14. In May, 1992, the Police and Fire Commission rejected Will's appeal of the termination.

15. In June, 1992 MPSO filed the instant complaint.

16. In the December 9, 1991 private conference between Will and Arreola, Arreola did not say, "You can say what you want and I can say what I want because we can both call each other liars," "Whose idea was it to file a grievance?" "Sometimes the Union is out to protect its position as a whole and not an individual's rights," nor "I don't like grievances filed against me."

#### CONCLUSIONS OF LAW

1. Chief Arreola did not make the alleged remarks attributed to him in the MPSO complaint filed June 4, 1992 and therefore did not interfere, restrain or coerce Sergeant Richard Will in violation of Sec. 111.70(3)(a)1., Stats.

2. Inasmuch as MPSO has not exhausted the contractual grievance procedure, the Examiner will not assert the Commission's jurisdiction over the alleged violation of Sec. 111.70(3)(a)5., Stats.

#### ORDER 1/

The Complaint should be, and hereby is, dismissed.

Dated at Madison, Wisconsin this 31st day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/  
Jane B. Buffett, Examiner

- 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.

CITY OF MILWAUKEE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER

BACKGROUND

During the relevant time period, Richard Will was a Sergeant in the Police Department (the Department), of the City of Milwaukee (the City), having been employed by the Department for eighteen years. Will was a member of the bargaining unit represented by the Milwaukee Police Supervisor's Organization (MPSO). Sometime prior to September 21, 1991, the Internal Affairs Division began to investigate a question whether Will was in violation of the residency requirement and the prohibition on conducting a business without the Chief's approval.

On September 21, 1991 Will filed a grievance asserting he should have been promoted to a vacant Lieutenant position which existed as of September 15, 1991. On December 3, 1991, representatives of the Department and MPSO agreed to hold the grievance relating to the promotion in abeyance pending the outcome of the disciplinary proceedings relating to the residency matter.

On December 9, 1991 Will and MPSO President Dennis Forjan met with Chief Arreola and two other members of the Department for an informal investigation regarding the residency matter. At the end of the meeting, Forjan requested, on Will's behalf, a private conference between the Chief and Will at which Will might inform the Chief of some confidential matters that he believed affected

the residency issue.

The statements made during the private conference are in dispute. Will states that Arreola opened the conversation by saying, "You can say what you want and I can say what I want because we can both call each other liars." When Will did not respond, the two men discussed the confidential matter relating to the discipline. During the course of the conversation, Arreola asked Will, "Whose idea was it to file a grievance?" Will responded that it was his own idea and he told Arreola some of the history surrounding the grievance filing. Will also reported Arreola said, during the private conversation, "Sometimes, the Union is out to protect its position as a whole and not the individual's rights," and "I don't like grievances filed against me."

Arreola's version of the private conversation is that it began with Will stating that he did not want anyone else who had been in the room to be told the confidential information he was about to tell Arreola. In addition to listening to the confidential information, Arreola discussed Will's good record as a sergeant in the Department. Arreola testified that he believed if the grievance was discussed at all, it was discussed that it would be resolved after the residency case was resolved. Arreola unequivocally denied the four quotations attributed to him by Will.

Subsequent to December 9, an additional meeting took place relating to the residency issue and Will was eventually found in violation of the residency requirement and terminated from the Department. In May, 1992 the Police and Fire Commission upheld the termination.

On June 4, 1992, MPSO 2/ filed a Complaint of Prohibited Practices with the Wisconsin Employment Relations Commission, alleging that the Chief, by comments noted above, interfered, coerced and restrained Will in the exercise of his statutory rights by statements he made to Will in the private conference between the two men on December 9, 1991. Additionally, the Complaint asserts that the Chief negotiated individually with Will over the grievance in violation of the Collective Bargaining Agreement.

#### POSITIONS OF THE PARTIES

##### A. Milwaukee Police Supervisors Organization

MPSO asserts its testimony regarding the disputed private conference is more credible than Arreola's version and the Examiner must conclude that Arreola did in fact ask Will whose idea it was to file the grievance, did indeed state that the Union was sometimes out to protect its position as a whole and not the individual's rights and did indeed say that he did not like grievances being filed against him. MPSO asserts Forjan and Will testified more credibly than Arreola because Will repeated his comments to Forjan immediately after leaving the room whereas Arreola was not aware of the prohibited practice complaint until May of 1992 and had not therefore thought about the conversation until six or seven months after it occurred and did not have any notes of the meeting that he could review.

Chief's Arreola's statements, argues MPSO, infringed on Will's statutorily protected right to file a grievance and to have representation for

---

2/ At the hearing, the filing date of the Complaint was referred to as "in May." The Complaint was dated May 26, 1992, but was not received in the Commission offices until June 4. This discrepancy has no material bearing on this case.

the grievance. MPSO cites both Commission and NLRB law to support its position. Those statements also constituted direct negotiation with a grievant in violation of Article 7 of the Collective Bargaining Agreement.

#### B. The City

After citing applicable law regarding violations of Sec. 111.70(3)(a)1, Stats., the City argues that logic supports Chief Arreola's testimony that he did not make the allegedly coercive statements. Since Will has asked for the private conversation to discuss confidential information relating to the disciplinary matters, it was logical that the conversation would not have focused on the grievance matter. It is the more illogical to believe that conversation would turn to the grievance since the parties had already agreed to hold the grievance matter in abeyance. As to the alleged statement by the Chief that he did not like grievances, the City argues the reasonableness of the Chief's statement that grievances are a normal part of business in a city police department. In all, the City asserts that MPSO has not met its statutory burden of proof that the City has interfered with the individual's rights to support a union.

As to the alleged breach of contract claim, the City asserts that matter has not been grieved and therefore the Commission should not take jurisdiction of the matter.

#### DISCUSSION

##### A. Alleged Violation of Sec. 111.70(3)(a)1, Stats.

Section 111.70(3)(a)1, Stats. makes it a prohibited practice for a municipal employer:

1. To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2).

Section 111.70(2), Stats. describes the rights protected by Sec. 111.70(3)(a)1, Stats. as being:

- (2) RIGHTS OF MUNICIPAL EMPLOYES. Municipal employes shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. 3/

MPSO argues that comments which Will asserts Arreola made during the private conversation interfered with Will's protected rights to file a

---

3/ Cedar Grove-Belgium Area School District, Dec. No. 25849-B (WERC, 5/91).

grievance, to involve himself in the grievance procedure and to have representation in the grievance procedure. Will asserted that Arreola said to him, "You can say what you want and I can say what I want because we can both call each other liars," "Whose idea was it to file the grievance?" "Sometimes the union is out to protect its position as a whole and not an individual's rights," and "I don't like grievances filed against me."

Arreola denied making these statements.

In this case of a diametrical conflict in testimony regarding the crucial material fact, there is no direct evidence other than that of the two participants. Consequently this Examiner must resort to drawing inferences from circumstantial facts in an attempt to reach a conclusion as to which version is more likely to be true.

When denying having said, "You can say what you want and I can say what I want because we can both call each other liars," Arreola testified such a statement would have been out of character for him. Indeed, much of what Arreola was alleged to have said would have been out of character, even nonsensical, for the chief of a large city police department. Arreola has been Chief for approximately three years and has worked in law enforcement for 32 years. In such work he would be well aware of the importance of avoiding careless remarks, such as the alleged remark about liars, lest such remarks be misconstrued or become the basis for adverse publicity. Indeed, Arreola's demeanor in the hearing room as observed by this Examiner could be best labeled as "detached formality," indicating Arreola appreciated the value of reserved and self-restrained conduct.

Reasoning further from Arreola's position in management leads to the conclusion that he was accustomed to the filing of grievances as a part of labor relations. His testimony that he respects the grievance procedure as a normal legal manner of redress is a statement consistent with his position and responsibilities. His denial that he said that he did not like grievances filed against him is quite plausible.

It also seems illogical that this particular grievance would arouse such a level of feeling in Arreola to cause him to make such intemperate remarks. Thus was not a grievance that involved Arreola personally or put him in a bad light by alleging something such as corrupt or incompetent management. Indeed, the outcome of the grievance seemed to be nearly a foregone conclusion once the disciplinary question was resolved. Arreola testified that if the disciplinary issue were resolved in Will's favor, he would most likely receive the promotion and if Will were terminated, the promotion issue would be moot. These facts are not the ingredients of a situation in which a manager would be trying to pressure a grievant to withdraw a grievance. It is difficult to believe that Arreola would take the risk of committing a prohibited practice when he had so little self-interest at stake in the grievance.

At the time of the meeting, the grievance was not even the focus of attention, since the parties had already agreed to hold the grievance in abeyance pending the outcome of the disciplinary matter. Given these circumstances, it seems unlikely that Arreola would have been sufficiently troubled by the grievance to make the unrestrained remarks attributed to him. Arreola testified that he was in a passive, listening mode since the purpose of the private conference was to listen to confidential matters that Will had asked to present to the Chief personally. Because there is no evidence Arreola had any expectation this conversation would take place, Arreola could not have been anticipating and planning for the opportunity to make intimidating remarks to Will when no witnesses were present.

Finally, there is nothing in Arreola's conduct outside of the private conference that would indicate such remarks during the private conference. There is no evidence of personal animosity between Arreola and Will. Arreola testified that he did not know Will personally, and knew only that he was a sergeant in the Department. He also testified that he knew Will had a good record and the meeting scheduled in January to review documents relating to the disciplinary action had been postponed because Arreola was hoping to find a legal option to termination if a violation of the residency requirement was found. None of this indicates the kind of hostility that would give rise to the inference that such pressure might have taken place.

Indeed, nothing outside that private conference creates a probability that the alleged remarks took place. Both Will and Forjan testified that Will spoke about the alleged statements to Forjan after the private conference, but the two testimonies were inconsistent, and Forjan's testimony was presented not for the truth of the matter but to show that a discussion between Will and Forjan took place. Having considered Will's and Forjan's testimonies regarding what Will said to Forjan immediately after the private conversation, this Examiner does not find that testimony makes Will's version of the conversation more credible than Arreola's.

The undersigned draws no conclusion from the fact that this Prohibited Practice Complaint was not filed until after Will's termination had been upheld by the Police and Fire Commission and the alleged remarks were not mentioned to anyone in management prior to the filing of the Complaint. Although it may appear to be a fabrication as the last play of a terminated employee, it is also possible (although not argued by MPSO) that while there was still a chance that Will would not be terminated, MPSO preferred not to muddy the waters with the Complaint.

Similarly, the undersigned reached no conclusions from an analysis of the advantages to each person of not telling the truth. Since both parties could serve their self-interests by fabrication, self-interest analysis yields no helpful result. If in fact, Arreola made the alleged remarks, not telling the truth would serve his interest by protecting his honor and reputation for fairness. If, in fact, Arreola did not make the alleged remarks, Will's fabrication would further his self-interest by demonstrating that his former employer committed a Prohibited Practice.

In summary, the undersigned finds no direct evidence to prove or disprove that Arreola made the alleged remarks. Various inferences, while not conclusive on their own, indicate it is unlikely that Arreola made the alleged remarks. Inasmuch as the Complainant in a Prohibited Practice Complaint must sustain its burden of proof by a clear and satisfactory preponderance of the evidence, 4/ the undersigned finds that MPSO has not met that burden, the Complaint must be dismissed.

---

4/ Section 111.07(3), Stats.



B. Alleged Violation of Sec. 111.70(3)(a)5, Stats.

Section 111.70(3)(a)5, Stats., provides that it is a prohibited practice to:

...violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees...

It is the Commission's long-standing policy to decline to assert jurisdiction over breach of contract allegations where, as here, the Complainant has failed to exhaust contractual grievance and arbitration procedures and where, as here, there has been no agreement by the parties to waive the arbitration procedure. 5/ Accordingly, this Examiner does not assert the Commission's jurisdiction in this case.

Dated at Madison, Wisconsin this 31st day of March, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Jane B. Buffett /s/  
Jane B. Buffett, Examiner

---

5/ Waupun School District, Dec. No. 22409 (WERC, 3/85).