STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant, vs. MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), Respondent.	Case 318 No. 46688 MP-2549 Decision No. 27664-A

Appearances:

Gimbel, Reilly, Guerin & Brown, Attorneys at Law, by Mr. Franklyn M. Gimbel and Ms. Marna Tess-Mattner, 2400 Milwaukee Center, 111 East Kilbourn Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County Courthouse, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On December 10, 1991, Milwaukee Deputy Sheriffs' Association filed a complaint with the Wisconsin Employment Relations Commission alleging that Milwaukee County (Sheriff's Department) had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1 and 5 of the Municipal Employment Relations Act. On May 25, 1993, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. Hearing on the complaint was held on July 15, 1993, in Milwaukee, Wisconsin. The parties filed briefs and reply briefs, the last of which were received on October 4, 1993. The Examiner, having considered the evidence and arguments of Counsel, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Milwaukee Deputy Sheriffs' Association, hereinafter referred to as the Association, is a labor organization, and its principal offices are located at 821 West State Street, Milwaukee, Wisconsin 53233.

2. Milwaukee County, hereinafter referred to as the County, is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats., and its principal offices are located at 901 North Ninth Street, Milwaukee, Wisconsin 53233.

3. The Association and the County have been, at all times material herein, parties to a collective bargaining agreement covering all Deputy Sheriffs, Deputy Sheriffs I, Deputy Sheriffs II and Deputy Sheriff Sergeants employed by the County. The collective bargaining agreement contains a grievance procedure which culminates in binding arbitration.

4. Charles Coughlin is a Deputy Sheriff I employed by the County and is the Treasurer of the Association. In 1991, Coughlin was assigned to the jail and served as a liaison with management personnel for union matters.

5. In 1991, the construction of a new jail caused the County to hire a new class of recruit deputies to work in the jail, which caused concern among incumbent deputies that their shifts might be changed because of the training of the new recruits. Coughlin and the Administrative Lieutenant of the jail, Stacy Black, had conversations addressing this issue. Coughlin and Black had different understandings of the results of these conversations, with Coughlin believing a firm agreement had been reached and so informed other employes. Black believed that they had developed a proposal which he would recommend to the Director of the Detention Bureau. The proposal was not approved by the Director, and Black did not inform Coughlin of this. Coughlin learned from a bargaining unit member that the member was being reassigned to accommodate recruit needs.

6. When Coughlin learned this on July 29, 1991, he phoned Black from the jail and asked what had happened. Black responded that management had vetoed the agreement. Coughlin asked when he was going to be informed about this and told Black that his credibility with bargaining unit members had been destroyed because he had been assured that the shift rotation problem had been worked out. Coughlin was very angry and very loud and both Coughlin and Black described Coughlin's language as "intemperate." Coughlin hung up before Black could respond.

7. Black called Coughlin's immediate supervisor, Sergeant Randy Tylke, and told him to bring Coughlin to Black's office. Coughlin and Tylke arrived in short order and Black ordered Coughlin to write a report of the phone incident. Coughlin refused, saying that because the incident was related to his collective bargaining responsibilities and not to his employment duties, it was inappropriate to write up an incident report. Black reported the incident to the Office of Professional Standards. Lieutenant Misko of that office ordered Coughlin to write the report and answer a questionnaire. Coughlin refused on the same grounds as before and Misko suggested Coughlin consult with the Association's labor counsel. Ultimately, Coughlin wrote the report and completed the questionnaire.

8. On August 24, 1992, Coughlin was given discipline for his conduct on July 29, 1991, and was given the choice of a three-day suspension or alternative discipline. Coughlin elected the three-day suspension. The discipline was appealed to arbitration before Arbitrator Jane B. Buffett. On May 7, 1993, Arbitrator Buffett issued an award upholding the three-day suspension and denying the grievance in its entirety.

9. Coughlin's conversation with Black on July 29, 1991, was protected concerted activity as it involved terms and conditions of employment of the employer-employe relationship and the suspension of Coughlin had a reasonable tendency to interfere with Coughlin's protected concerted activity.

Based on the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSIONS OF LAW

1. The Association demonstrated by a clear and satisfactory preponderance of the evidence that the County interfered with Coughlin in the exercise of rights guaranteed by the Municipal Employment Relations Act, by its three-day suspension of Coughlin, and therefore, the County violated Sec. 111.70(3)(a)1, Stats.

2. The Commission will not assert its jurisdiction to determine whether the County has violated Sec. 111.70(3)(a)5, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER 1/

IT IS ORDERED that Milwaukee County, its officers and agents, shall immediately:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of rights protected by Sec. 111.70(2), Stats.

2. Take the following affirmative action which the Examiner finds will effectuate the policies of the Municipal Employment Relations Act.

   a. Make Coughlin whole for the wages and benefits lost as a result of his three-day suspension issued on August 24, 1992.

   b. Expunge from Coughlin's personnel files any reference to any disciplinary action based on the July 29, 1991 telephone conversation with Lieutenant Black.

   c. Notify Sheriff's Department employes represented by the Association by conspicuously posting the attached Appendix A in places where notices to employes are customarily posted, and take reasonable steps to assure that said notice remains posted and unobstructed for a period of thirty days.

   d. Notify the Wisconsin Employment Relations Commission within twenty days of the date of this Order as to what steps the County has taken to comply with the Order.

Dated at Madison, Wisconsin, this 26th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ See footnote on Page 4.

By Lionel L. Crowley /s/
Lionel L. Crowley, 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 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.

This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).

"APPENDIX A"

NOTICE TO ALL EMPLOYES

As ordered by the Wisconsin Employment Relations Commission, and in order to effectuate the policies of the Municipal Employment Relations Act, we notify our employes that:

WE WILL NOT in any manner interfere with, restrain, or coerce our employes in the exercise of rights protected by Sec. 111.70(2), Stats.

Dated this _____ day of _____, 1993.

MILWAUKEE COUNTY

By _____

THIS NOTICE MUST REMAIN POSTED FOR 30 DAYS FROM THE DATE HEREOF, AND MUST NOT BE ALTERED, DEFACED OR COVERED BY ANY OTHER MATERIAL.

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In its complaint initiating these proceedings, the Association alleged that the County violated Secs. 111.70(3)(a)1 and 5 by suspending the grievant based on his conduct while acting as a Union representative. The County denied that it committed any prohibited practices and sought dismissal of the complaint.

Association's Position

The Association contends that Coughlin was acting in his Union capacity when he used intemperate language in his telephone conversation to Black and when he refused to write a report about the matter. It submits that activities by Union members with regard to labor relations matters are protected by state and federal laws and speech is particularly protected. It argues that comments critical of employer or employe representatives do not constitute a violation of the Municipal Employment Relations Act (MERA) unless they include express or implied threats or promises. It asserts that employes have a protected right to express their concerns to employers on labor matters. The Association points out that the parties have not limited Union activities between the Association and the County to off-duty hours and that intemperate language during these activities has never before resulted in discipline. It maintains that Coughlin's remarks to Black were protected and the imposition of discipline constitutes interference and restraint of Coughlin's exercise of his protected rights. The Association asks for an order that the County cease and desist from disciplining bargaining unit representatives who engage in protected activities and that Coughlin's discipline be purged from the records and he be made whole.

County's Position

The County contends that the Association failed in its burden of providing evidence sufficient to sustain the allegations contained in the complaint. The County objects to these proceedings because the underlying grievance was decided in arbitration and it is being denied the benefit of its bargain because the Association is collaterally attacking the final and binding award of the arbitrator. The County also asserts that its rights and those of Black are being violated under Secs. 111.70(3)(b)2 and 4, Stats., by the continuation of this proceeding.

The County contends that a review of the evidence establishes that the Union has not met its burden of proof. It submits that the testimony of Milwaukee Police Association official, Bradley DeBraska is irrelevant and immaterial as he had no firsthand knowledge of the instant case or of the County's operations. The County dismissed the testimony of Ronald Bollhofer because it merely reflects a personal management style of his own and he is biased because of his past reduction in rank by the Sheriff. As to the testimony of Gerald Reider, it notes that nothing relieves a Union representative from being held accountable to the rules of conduct and that nothing in the agreement allows Union business on County time and an employe must first obey a directive and then grieve it. The County alleges that Coughlin's testimony was that he was not the Union representative, that a grievance which supposedly justified his misconduct never existed and that his remarks to Black were not to a management representative. The County argues

that the contractual dispute is moot as it has been arbitrated and the discipline is also moot as the complaint was filed before discipline was imposed and the arbitration proceeding is conclusive and cannot be collaterally attacked. The County requests that the complaint be dismissed and the Association be ordered to cease and desist further harassment of the County and other employes.

Association's Reply

The Association contends that the County's argument that the arbitration bars the instant complaint is erroneous. It asserts the issue here is whether Coughlin's discipline interfered with his and the Association's rights and constituted a prohibited practice. It insists that Coughlin's activities were within the context of advocating the Association's concerns on shift transfers and the Association need only prove that the discipline had a reasonable tendency to interfere with his rights under Sec. 111.70(2), Stats. Coughlin, according to the Association, had the right to engage in "uninhibited" and "robust" speech while discussing labor disputes, and disciplining him for this constitutes a prohibited practice. It reiterated its request for relief.

County's Reply

The County submits that there was no stipulation that Coughlin was acting as a Union representative during the course of his misconduct. It argues that imposing discipline on Coughlin is not a prohibited practice and Union representatives are not clothed with any immunity and should not be treated differently from other employes. It insists that Union status does not shield an individual from discipline. It maintains that the discipline and the circumstances surrounding it were ruled on by the arbitrator and that decision is conclusive. It claims that discipline is appropriate where the Union official acts irresponsibly and disregards the contract and work rules encompassed by the contract. It alleges that Coughlin is not cloaked with the right to be insubordinate or wantonly flaunt department rules of conduct. It reiterates that Coughlin's expressions were not made to management but to another non-management employe. It takes the position that the arbitrator's determination in this matter is conclusive and cannot be collaterally attacked. It submits that this case requires one result -- dismissal of the complaint.

Discussion

The complaint alleges a violation of Sec. 111.70(3)(a)5, Stats. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer:

> 5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

Generally, the Commission will not exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for a grievance procedure with final and binding arbitration. 2/

2/ Joint School District No. 1, City of Green Bay, et al., Dec. No.

Here, the parties' collective bargaining agreement provides for final and binding arbitration and an arbitrator issued an award upholding the three-day suspension. 3/ The County has correctly argued that the arbitrator's award is final and binding and conclusive with respect to the contractual violation. The parties must live with their bargain, and the Commission's policy is to give full effect to the parties' agreed-upon procedures for resolving disputes arising under their contract. Therefore, the undersigned will not exercise the Commission's jurisdiction over the contractual dispute and the allegation of a violation of Sec. 111.70(3)(a)5, Stats., has been dismissed.

The complaint also alleges a violation of Sec. 111.70(3)(a)1, Stats. Section 111.70(3)(a)1, Stats., provides that it is a prohibited practice for a municipal employer "To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)." Section 111.70(2), Stats., provides as follows:

> **(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.

In order to prevail upon the allegation that an employer has violated Sec. 111.70(3)(a)1, Stats., the complaining party must demonstrate, by a clear and satisfactory preponderance of the evidence, that an employer has engaged in conduct which has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. 4/ A violation may be found where the employer did not intend to interfere and an employe did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights. 5/ A finding of anti-union animus or motivation is not necessary to establish a violation of Sec. 111.70(3)(a)1. 6/

The County has forcefully argued that the arbitrator's decision is conclusive on the Commission with respect to the alleged violation of Sec. 111.70(3)(a)1, Stats. However, where discipline poses an arbitrable dispute under the collective bargaining agreement but also is a prohibited practice within the Commission's jurisdiction, the Commission's statutory authority to determine whether a prohibited practice was committed is not foreclosed by an arbitrator's award. Where an employer imposes discipline, it may not violate the parties' contract, but may very well be a prohibited

---

16753-A, B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196-A, B (WERC, 12/79).

3/ Joint Exhibit 1.

4/ WERC v. Evansville, 69 Wis.2d 140 (1975).

5/ Beaver Dam Unified School District, Dec. No. 20283-B (WERC, 5/84); City of Brookfield, Dec. No. 20691-A (WERC, 2/84); Juneau County, Dec. No. 12593-B (WERC, 1/77).

6/ City of Evansville, Dec. No. 9440-C (WERC, 3/71).

practice. The Commission has long held that discipline motivated, in whole or in part, by anti-union animus constitutes a prohibited practice. 7/ Although an arbitrator could find just cause for discipline, the Commission could find that the discipline constituted a prohibited practice. Therefore, the County's arguments that the arbitrator's decision is conclusive with respect to the complaint is not persuasive.

The Association contends that Coughlin was engaged in lawful concerted activities and the suspension interfered with these activities. The County claims that Coughlin was not engaged in lawful concerted activities. A review of the arbitrator's facts indicates that Coughlin and Black had discussions concerning shift changes for incumbent deputies. This conduct is lawful concerted activity as it falls within the rights enumerated under Sec. 111.70(2), Stats. The conduct of Coughlin on July 29, 1991, was part of the on-going discussions with respect to shift changes and was also concerted activities. The issue is whether the angry, loud and "intemperate" language in the phone conversation is protected. The Commission has held that statements which are made as a personal attack and not in good faith are unprotected and an employe may be properly disciplined for such conduct, even if it is part of protected concerted activities. 8/

7/ Muskego-Norway C.S.J.S.D. No. 9 v. W.E.R.B., 35 Wis.2d 540 (1967); Employment Relations Department v. WERC, 122 Wis.2d 132 (1985).

8/ City of Kenosha, Dec. No. 25226-B (WERC, 2/89).

In short, even if an employe is engaged in concerted activities, the employe's rights are not absolutely immune from discipline. The employe's rights to engage in concerted activities must be balanced against the employer's right to maintain order and respect.

The County cannot discipline an employe for insubordination if the discipline tends to interfere with the exercise of his protected activities. On the other hand, the County can discipline the employe where his conduct is opprobrious. It is generally recognized that in collective bargaining and in grievance meetings frank discussions of the issues may result in heated exchanges and the use of coarse language is not uncommon. However, the interests of collective bargaining are not served by the external imposition of a rigid standard of proper and civilized behavior. 9/ Whether an employe's conduct was so extreme as not to be protected must be determined on a case-by-case basis after the facts and circumstances of the case are examined. Calling a supervisor a "liar" during a grievance session was protected; 10/ however, racial or sexual comments intended to demean and degrade a supervisor are not protected. 11/ Similarly, an employe engaged in protected activity of speaking with the employer's president on the plant floor in the presence of a large number of co-workers, who insulted the president, directed obscenities at him and refused to leave unless fired, was properly discharged. 12/

A review of the facts of the instant case reveals that Coughlin was angry and very loud and used "intemperate" language. The County's assertion that Black was not management is not persuasive. Black was a supervisor, albeit in a collective bargaining unit of supervisors, and one of Coughlin's supervisors. It appears that Black had authority to discuss the shift change problem and attempt to resolve it and actually recommend a resolution to his superiors. Thus, Black was acting on behalf of the County. A charge of insubordination necessarily involves a supervisor. The Association had the burden of proving by clear and convincing evidence that the suspension had a reasonable tendency to interfere with the right to engage in concerted activities. The evidence establishes that the suspension was based on Coughlin's comments to his supervisor which fall within the ambit of concerted activity. In balancing the interests of protecting the right of employes to engage in concerted activities against the County's interest in maintaining order and respect, Coughlin's

---

9/ Crown Central Petroleum v. NLRB, 430 F.2d 724, 74 LRRM 2855 at 2860 (5th Cir. 1970).

10/ Hawaiian Hauling Service v. NLRB, 545 F.2d 674, 93 LRRM 2952 (9th Cir., 1976).

11/ Peninsular Steel Co., 88 LA 391 (Ipareec, 1986); Hobart Corp., 88 LA 512 (Strasshofer, 1986).

12/ Marico Enterprises, 283 NLRB No. 112, 125 LRRM 1044 (1987).

loud, angry and intemperate language is conduct which is not so outrageous, offensive, defamatory or opprobrious as to be unprotected. The record is unclear whether the discipline meted out to Coughlin was based, in part, on his refusal to provide a written report about his conversation with Black and answer a questionnaire. Certainly, the County could ask Coughlin for such a report to determine whether his conduct "stepped over the line" and was opprobrious and therefore not protected. Coughlin did submit the report on advice of counsel. The report was not put in evidence and the evidence failed to establish that Coughlin was disciplined because of his failure to write the report.

Coughlin was engaged in protected concerted activities in discussions over the shift changes with Black and the conduct does not appear premeditated or flagrant, so the discipline for his conduct had a reasonable tendency to interfere with Coughlin's protected rights. The County, therefore, violated Sec. 111.70(3)(a)1, Stats., by disciplining Coughlin, and the County is ordered to make him whole.

Dated at Madison, Wisconsin, this 26th day of October, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner