STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WALWORTH COUNTY COURTHOUSE EMPLOYEES UNION LOCAL 1925-B, AFSCME, AFL-CIO, Complainant,

vs.

WALWORTH COUNTY, Respondent.

Case 136
No. 54930
MP-3278

Decision No. 29123-B

Appearances:

Mr. Laurence S. Rodenstein, Staff Representative, on behalf of the Union.

vonBriesen, Purtell & Roper, S.C., by **Mr. James R. Korom**, on behalf of the County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: Complainant Walworth County Courthouse Employees Local 1925-B, AFSCME, AFL-CIO ("Union"), filed a prohibited practices complaint with the Wisconsin Employment Relations Commission ("Commission"), on February 24, 1997, alleging that Walworth County ("County"), had committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 2 and 3 of the Municipal Employment Relations Act ("MERA"), by *inter alia*, discriminating against union adherents and by interfering with their union activities. The Commission on June 24, 1997, appointed the undersigned to issue and make Findings of Fact, Conclusions of Law and Order as provided for in Section 111.07(5), Wis. Stats. The County on July 9, 1997, filed its Answer and the Union on July 11, 1997, filed an Amended Complaint. The County on July 9, 1997, also filed a Motion to Dismiss which was denied on October 15, 1997. Hearing was held in Elkhorn, Wisconsin, on October 31, 1997, at which time the County answered the Union's Amended Complaint and the hearing was reconvened on December 16, 1997. The Union at the hearing withdrew some of its complaint

allegations and, pursuant to the County's renewed motion, I dismissed certain other allegations. After the Union amended its Complaint to charge that the County failed to give it certain information, the parties at the hearing agreed to settle the Union's request for said information. Both parties filed briefs and the County filed a reply brief which was received by March 6, 1998.

Having considered the arguments of the parties and the entire record, I make and issue the following Findings of Fact, Conclusion of Law and Order.

FINDINGS OF FACT

1. The Union, a labor organization within the meaning of MERA, maintains its principal office at 8033 Excelsior Drive, Madison, Wisconsin 53717. The Union is the exclusive collective bargaining representative for certain regular full-time and regular part-time courthouse employes of Walworth County, excluding elected officials, supervisors, confidential employes, court reporters, deputy coroner, and all other employes of Walworth County as certified by the Commission on February 3, 1970. At all times material herein, Laurence S. Rodenstein has served as its Staff Representative and has acted on its behalf.

2. The County, a municipal employer within the meaning of MERA, maintains its offices at P.O. Box 1001, 100 West Walworth Street, Elkhorn, Wisconsin. Its principal representative in this matter is Attorney James R. Korom, vonBriesen, Purtell & Roper, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin. At all times material herein, Dean R. McKenzie has served as Sheriff of Walworth County and has acted on its behalf.

3. The Union and the County have been privy to a series of collective bargaining agreements, the last of which was effective from January 1, 1994, to December 31, 1996.

4. Following a 1991 grievance meeting, former Captain John Reiff, who is now retired, took a bunch of papers in his hand and hit then-Union Steward Alice Nocek, a Correctional Officer, on either her head or her shoulders. Reiff subsequently apologized to Nocek over this incident. Nocek in 1993 attended an investigatory meeting where she was represented by Union Staff Representative Rodenstein who became involved in a shouting match with Lieutenant David Starks, during which time Rodenstein took a tape recorder out of Starks' hands. Starks at that time may have threatened to have Rodenstein arrested.

5. At all times material hereto, Kathy Franklin has been employed by the County as an Assistant Property Lister and Dian Strunk has been employed by the County as a Word Processing Coordinator. Both have held Union offices and both have engaged in extensive concerted, protected activities over the years, many of which were known to the County.

6. A local newspaper in April, 1996, published a letter to the editor signed by Union President Franklin, Union Vice-President Linda Eastburg, Union Secretary Strunk, and Union Treasurer Marilyn Kaddatz which identified their various Union offices and which stated:

Guest Perspective

Guards' life worse than prisoners'!?

The employees who serve as Walworth County Corrections Officers are members of Walworth County Courthouse Employees Local 1925B. We are their union officers.

There have been articles in recent area newspapers regarding the extremely difficult working conditions that this faction of our membership has been subjected to since the new law enforcement center opened.

In an attempt to educate the citizenry of Walworth County as to the need for correction in Corrections, we are forwarding this to you.

. . .

Immediately below said letter appeared the following:

A DAY IN THE LIFE OF. . .

A WALWORTH COUNTY INMATE	**A WALWORTH COUNTY CORRECTIONS OFFICER**
I am innocent until proven guilty.	I am guilty until proven innocent.
I can regularly see my family and friends.	When I report to work, I do not know when I will see my family.
I can regularly phone my friends and family.	I can't access an "outside" telephone line.
I can have my complaints heard in a timely manner.	I can't.
I can plan a vacation.	I can't.

I receive counseling and support.	I am demeaned and belittled.
I can visit with my peers.	I can't.
I receive medical attention when I am ill.	I am ordered to remain at my post when I am ill.
I can rest when I'm tired.	I can't have a "break".
I can blame jail authorities if I get hurt.	I'll be the scapegoat if someone gets hurt.
I get dental attention when I have a toothache.	I am ordered to remain at my post when I have a toothache.
I am "locked down" if I am bad.	I am "locked in" without relief.
I get cupcakes when I've been good.	I work double shifts, and if I'm lucky, someone will bring me a soda.
I don't do my own laundry.	I do my own laundry.
I receive three meals a day.	I can't access the kitchen or a refrigerator.
If I am a Huber (work release) inmate, I am allowed to leave the facility at a scheduled time.	I never know when I will be allowed to leave; therefore I may miss school classes or second jobs.
I know when I will be allowed to return home.	I don't.
I am not subject to my sleep being interrupted.	I get calls all hours of the day and night ordering me to work.
I have staff looking out for my health and safety.	I do not feel safe.

If I am a Huber inmate, I can only be released to work for a maximum of 12 hours a day, 6 days a week.	I can be ordered to work 16 hours a day, seven days a week.
My rights are honored.	My rights are ignored.

7. A local newspaper on July 4, 1996, published a letter to the editor under the heading "Courthouse Employees Are Not Safe" signed by Union President Franklin which identified her Union office and which stated:

> **To the Editor:**
>
> I have just finished "catching up" on the news of last week, June 18-22. The papers were here, waiting for me, upon my return from AFSCME's International Convention in Chicago.
>
> My days at the convention were filled with passing resolutions to protect public sector employees and strengthen workers rights. I listened with renewed hope to speakers such as AFSCME President Gerald McEntee, Secretary/Treasurer William Lucy, Senator Edward (Ted) Kennedy, John Sweeney, President of the AFL-CIO, Myrlie Evers-Williams, chairperson of the NAACP, US House of Representatives Minority Leader Richard Gephardt and President William Clinton.
>
> I talked to AFSCME Corrections United Staff, international representatives, the Connecticut Council of Police and numerous other law enforcement representatives about our ongoing problems in corrections. The staffing shortages, mandatory overtime, unsafe working conditions, increased health risks and the list goes on. The fact is, that all of the above could be addressed or non existent if sheriff's management, County Board members and jail administration would actively work to resolve these issues instead of being the principle cause of them.
>
> I then read the headlines in the paper "sheriff agrees to abide by judge's order," "county hires outside lawyer for sheriff in security flap." There are avenues that can demand safety or else. Why does county board member James Byrnes support hiring a lawyer to "protect the sheriff" instead of getting the message that "protecting state and county employees as well as the tax paying citizenry" is the real issue here? What part of accountability doesn't he understand?

To Supervisor Byrnes' statement "if the public gets the perception that there's no security in the courthouse, that's simply not true," I answer perception is reality and it is not only the courthouse it is also the jail and the law enforcement center that is not safe or secure. We don't come to work to die, and the public comes to county government for public services not funeral services.

I commend Judge Gibbs. He is, in effect, protecting me as a courthouse employee. He is also protecting you.

The 31 year old widow of a corrections officer and his three children now have a plaque instead of a husband and father -- tell them that safety in the workplace is only a perception.

I am appealing to each and every one of you that thinks they cannot make a difference -- you can. Judge Gibbs can "issue an order" or have the ability to hold the sheriff in "contempt". You have the ability to issue an order or hold your elected officials accountable.

Call or write your county board representative, and tell them that our correctional officers and all the employees of the county as well as you, their constituents have a right to safety. Don't believe the old adage, "what you don't know won't hurt you." It can and will.

We cannot order jail administration to take the necessary steps to protect the protectors as Judge Gibbs can have citizens and courthouse employees protected, but we can support him in his effort and send a message to our board members. If you are unsure of who your board representative is, call the county clerk at 741-4241 for a name, address and phone number.

Thank you,

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8. A local newspaper in July, 1996, published a letter to the editor under the heading "Courthouse safety is black and white" signed by Union Secretary Strunk which did not identify her Union office and which stated:

. . .

As a resident of Walworth County, a taxpayer, a courthouse employee and a secretary of Local 1925B Walworth County Courthouse Employees, I am compelled to respond to Mr. Benson's letter of July 14, 1996.

The residents of this county have the right to expect safety and order in their homes, at their work places and in public buildings. The inference drawn from Mr. Benson's comments is that (ir)responsible management of public funds would be to dilute those areas of health and safety which the County Board supervisors have been entrusted to serve as custodian of.

Perhaps Mr. Benson and the Sheriff's Department share the same view of public safety. I recall a successful escape in 1992 from the Walworth County Jail Annex, a deteriorated, insecure, 120-plus year old building that was being used as a medium security facility. The escapee succeeded in kicking out a window and fled to Marion County, Ind., where he successfully eluded authorities for four and a half months. (If you missed Mr. Benson's letter, he related his experiences as director of human resource management in Marion County, Ind.) Is this irony or did this convict perhaps know where public protection was lax in the "interest of not wasting taxpayers money?" Or was this a conspiracy on part of the Sheriff's Department to justify the need for a $20 million Law Enforcement Center?

My desk is located less than 50 feet from Judge Gibbs' courtroom. For several years I have had an alarm button that I can press when disruption warrants it. I have had occasion to use it a total of four times - three times since the Sheriff's Department has been relocated to the new Law Enforcement Center. The quickest response to my alarm since the move was five minutes, long enough for an perpetrator to be halfway to the Illinois state line.

The need for security has escalated, and I believe it is due in part to the absence of sufficient security-related deterrents. Prior to the Sheriff's Department move, uniformed officers and squad cars were highly visible. This is no longer the case. Have you ever been pushing the gas pedal on the interstate and come upon a bevy of cars going the speed limit? Chances are some type of law enforcement vehicle is leading the pack. That is what I mean by deterrent.

The current level of officers assigned to courthouse security does not adequately - (?) the demand. They do a fine job considering they are spread too thin. It is impossible to properly perform any duty without adequate tools - courthouse security included.

> Fellow Walworth County residents, we must demand safer conditions for our courthouse. The bombing in Oklahoma City should be a wake-up call for all of us. The Murrah Federal Building had no security personnel, surveillance cameras or check-in points. Nineteen innocent children lost their lives and another 200 lost one or both parents in this horrible atrocity. I do not look at the young children I see in the courthouse building everyday in the same way I used to. Are we compromising their safety and well-being?
>
> In Mr. Benson's opinion, the actions of Judge Gibbs are motivated by a desire for a new Justice Center. If that were true, he wouldn't be taking measures to try to prevent harm in his courtroom. Wouldn't he be more inclined to let the situation continue to deteriorate to the point of physical injury or death in order to advocate the need for a Justice Center?
>
> I do question, however, the priorities of the Sheriff's Department. How can you put a price on a human life? This is the very department that is "sworn" to enforce the law and protect and citizens in its jurisdiction. This department received results of a manpower and organizational study in June which recommends court security levels akin to those that Judge Gibbs has been asking for. Instead, they are spending money on legal representation to fight his court order. Every citizen in this county needs to ask themselves, "Can we afford a lawsuit for ignoring additional security and pay the price when tragedy strikes?"
>
> Please contact your County Board supervisors and let them know your feelings on courthouse safety. Safety is a black and white issue!

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9. The letters referenced in Findings of Fact 6-8, supra, were sent in part to answer certain public criticisms of employes and in order to express safety concerns over how the County's former jail, then about 125 years old, was being operated.

10. Assistant Jail Administrator Lt. Mark Welch by letter dated July 17, 1996, informed Undersheriff David Graves who is second in command in the Sheriff's Department:

> After review of the computer billing information presented to me by Deputy Larry DuBoise and the county's policy on computer use it is my recommendation that an investigation should be conducted due to the potential for criminal charges.

The three codes of interest, TX02DS, TX05DS, and DP55PCS1, should not be accessing user profile "correction".

Since we do have corrections staff at the courthouse they should be interviewed to see if they have used this user profile at any of those device locations prior to any other interviews.

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11. Welch in an unaddressed memo dated July 22, 1996, stated:

Re: Computer billing information

On Wednesday, 07-17-96 at approximately 0900 hours Deputy Larry DuBoise came to my office. With him he had the billing from the data center. He pointed out user profile "correction" and a job name "TX02DS". He told me that all job names should begin with "SH" which designates a sheriff's computer device. I asked Deputy DuBoise if he could find out where this device was located.

Later, on 07-17-96, I was advised by Deputy DuBoise that there were two devices on the data center billing reports, TX02DS and TX05DS, both located in the property listers office. I then asked Deputy DuBoise if he could review any previous bills from data to determine the extent this user profile had been accessed. He said he would and would also check to see if he could get any other information from data.

After review of the copies of the billing pertaining to user profile "correction" I noticed another device name "DP55PCS1" and made a notation on the copy as "who?".

On 07-17-96 I received a breakdown of the billings for the months of October, 1995 through June, 1996 from Deputy DuBoise. I put this information together with a copy of the county's policy on computer usage and my recommendations to the Undersheriff.

On 07-18-96 I met with Deputy DuBoise and the Undersheriff, David Graves. Deputy DuBoise was responding to questions about the computer when I arrived. He stated to the Undersheriff that he had received a report from data that there were hundreds of pages to go through. I told the Undersheriff that I would go through the reports and went with Deputy DuBoise to his office.

> At Deputy DuBoise's office I asked him if he could find out who device DP55PCS1 belongs to. He looked it up on the computer and found that it belonged to Diane Strunk in data. I then asked him why she would need access to user profile "correction"? He stated he didn't know unless there was something to update. I asked what is in there that would need to be updated? He stated he didn't know.
>
> I took the information from Deputy DuBoise and compiled it into a report dated 07-18-96, addressed to Undersheriff Graves.

. . .

Welch estimated that the total billing cost attributed to the Sheriff's Department for all these disputed computer entries totaled $22.67.

12. By letter dated July 29, 1996, Walworth County Assistant Corporation Counsel Gary Rehfeldt informed Sheriff McKenzie:

> Re: Investigation Into Possible Computer Crimes
>
> Dear Sheriff McKenzie:
>
> We have discussed this matter and I have reviewed this matter with departing Corporation Counsel David A. Bretl and we both concur, that because of the inherent conflicts in this matter, that you arrange for a law enforcement agency other than your department to investigate this matter.
>
> Because this matter involves very sensitive allegations, it is critical that whatever agency you select keep this matter absolutely confidential and that information is released on a strictly "need to know" basis. Also as I informed Undersheriff Graves on the phone, any investigation should begin by talking with Dan LeNoble, Data Department Head, so that the investigator can use his or her time efficiently. If you have any questions in this regard, please feel free to contact me.

. . .

13. By letter dated July 31, 1996, Sheriff McKenzie asked Chief James Coan of the Whitewater, Wisconsin, Police Department to investigate whether Sheriff Department employes had engaged in computer crime. Said letter stated:

> Re: Investigation of Alleged Computer Crime

> As we discussed over the phone, I am requesting your assistance in investigating allegations involving computer misuse. This matter involves allegations of misuse of the County computer system by a County employee. Because it could be construed as a conflict of interest, an outside agency is being sought. The investigator assigned to this matter by you, should be aware that this is a highly sensitive and confidential matter.
>
> Certainly your investigator will undoubtedly need to talk to Gary Rehfeldt, our Assistant Corporation Counsel. His office is located in the Courthouse and he may be reached at 741-4364. I would also recommend talking to Dan LeNoble, Director of Data, and his phone number is 741-4218. Beginning the investigation with these two individuals will allow your investigator to use his or her time efficiently.
>
> . . .

Said request for a criminal investigation was made without previously asking employes - who were readily identifiable as Franklin and Strunk because of their computer access codes - why they had accessed the computer information on the dates in issue.

14. Pursuant to Sheriff McKenzie's request, the Whitewater Police Department began an immediate investigation of said matter which included interviewing Union officers Franklin and Strunk. Said investigation was conducted by Whitewater police officer James Nevicosi. Strunk told investigator Nevicosi that Franklin told her it was permissible to use the computers for Union business because the County had given her, Franklin, permission to do so. Franklin, too, told investigator Nevicosi that she had received permission to use the computers for Union business from Undersheriff Graves in 1993-1994 after the Union had filed a grievance regarding vacation scheduling. Graves then gave Franklin the Sheriff Department's password, as he agreed that Franklin could use the Sheriff Department's computer to access when employes were scheduled to work so that she could make sure that vacations were being taken in proper order and that employes were available for grievance meetings. Franklin by memo dated December 14, 1993, therefore asked Graves:

> . . .
>
> "We had discussed the use of an electronic calendar to make this process a more successful one. We also talked about signing up for vacations electronically. Would it be helpful to include that in this proposal?"

The Sheriff's Department at that time was working on a new computer program to schedule vacations electronically. The Union and County by memorandum dated January 14, 1994, agreed to settle the vacation scheduling grievance.

15. Franklin and Strunk on about 62 occasions subsequently gained access to the Sheriff Department's computer files only for union-related business which necessitated access to the Sheriff Department's electronic vacation schedules. They did so because Graves had earlier given Franklin permission to do so. When they used the computers for that limited purpose, both Franklin and Strunk were engaged in concerted, protected activities. There is no evidence that either one of them ever tried to gain access for any other purpose and there similarly is no evidence that either Franklin or Strunk ever improperly used the information they accessed from the Sheriff Department's computer system.

16. By letter dated September 3, 1996, which was copied to Sheriff McKenzie, Graves informed Franklin:

> It has been brought to my attention that during the time I served as the Assistant Jail Administrator I gave either express or implied permission to non-jail members of Local 1925B to view various computer screens of the corrections division of the Walworth County Sheriff's Office.
>
> I will not dispute giving express or implied consent for such viewing, however, I must inform you that as of this date any and all consent, expressed or implied is hereby rescinded. (Emphasis added).
>
> The public viewing of Jail information and schedules creates a safety and security situation that can prove detrimental to the welfare of the public, staff and inmates.
>
> . . .

Neither Franklin nor Strunk ever tried to access the Sheriff Department's computer files after Graves sent said letter. In addition, the investigation by that point had failed to provide any evidence showing that either Franklin or Strunk had ever gained access to the computer files for any reasons other than to schedule grievance meetings and to make sure that vacations were being properly scheduled.

17. By memorandum dated October 11, 1996, Graves asked the County's District Attorney: "Please review the enclosed and give us your opinion on whether Kathy Franklin and/or Dian Strunk can and should be charged with computer crime."

18. By letter dated November 22, 1996, District Attorney Phillip A. Koss informed Graves:

. . .

I have reviewed the reports which you sent over requesting an opinion whether or not the above individuals could be charged with computer crime. It is my opinion that criminal charges are not appropriate. Please let me explain why.

Section 943.70, Wis. Stats., defines computer crimes. The only applicable section I could find prohibits one from accessing data "willfully, knowingly, and without authorization." I do not believe that we could prove that either Ms. Strunk or Ms. Franklin knowingly accessed any data "without authorization." Both Ms. Strunk and Ms. Franklin believe that they had authority to access correction records to assist in scheduling work hours. They stated that you had given them this permission in the past. I also note that your letter to them says "I will not dispute giving express or implied consent for such viewing. . ." (Emphasis added).

The fact that neither Ms. Franklin nor Ms. Strunk made any effort to hide the fact that they were accessing this data indicates that they believed that they had the authority to do so. Because Ms. Strunk works in data processing she certainly knows that records of her accessing other files can easily be determined. It leads me to believe that if she wished to do this without authorization that she would make it more difficult to determine which terminal was being used.

Therefore, given this factual basis I do not believe that criminal charges are appropriate or necessary. Thank you for your attention to this matter. If you have any questions please feel free to give me a call.

• • •

19. Neither Franklin nor Strunk was disciplined for gaining access to the Sheriff Department's computer system and neither was ever charged with engaging in computer crime or any other crime. No grievance was ever filed over the Sheriff's Department's investigation.

20. Two other Sheriff's Department employes have gained access to the County's computer system dealing with property taxes without receiving proper authorization to do so. Neither of them was ever disciplined and no criminal investigation was ever launched into said matter. The operative computer password was subsequently changed to prevent them from doing so again.

21. The County's continued criminal investigation into Franklin and Strunk's use of the Sheriff Department's computer system - after it learned that Graves had earlier granted them permission to do so - was not based on any legitimate business reasons, as it was reasonably intended to coerce and intimidate them and to interfere with their right to engage in concerted, protected activities.

22. Because of the criminal investigation and the fear that they would once again be singled out because of their union activities, both Franklin and Strunk have given up certain union activities pertaining to the County's jail division.

CONCLUSIONS OF LAW

1. Respondent Walworth County violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act when it continued its criminal investigation into whether Kathy Franklin and Dian Strunk had improperly gained access to the Sheriff Department's computer system after Undersheriff David Graves had given them permission to do so.

2. Respondent Walworth County did not violate any other sections of the Municipal Employment Relations Act.

Upon the basis of the above Findings of Fact and Conclusions of Law, I make and issue the following

ORDER

1. IT IS HEREBY ORDERED that Walworth County, its officers, agents and officials shall immediately:

1. Cease and desist from conducting criminal investigations into whether Kathy Franklin and Dian Strunk improperly gained access to the Sheriff Department's computer system.

2. Cease and desist from interfering with, coercing, or otherwise intimidating employes when they engage in concerted, protected activities.

3. Take the following affirmative action to rectify Walworth County's prohibited practice:

> Notify all employes by posting in conspicuous places where employes are employed copies of the Notice attached hereto and marked "Appendix 'A'". That notice shall be personally signed by Sheriff Dean R. McKenzie or his successor if he is no longer in office and it shall be posted immediately upon receipt of the Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Walworth County to ensure that said Notice is not altered, defaced, or covered by any material.

IT IS FURTHER ORDERED that the other complaint allegations be, and they hereby are, dismissed in their entirety.

Dated at Madison, Wisconsin, this 27th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYES

1. WE WILL cease and desist from conducting criminal investigations into whether Kathy Franklin and Dian Strunk improperly gained access to the Sheriff Department's computer system.

2. WE WILL NOT in any other manner interfere with, restrain or coerce employes in the exercise of their rights under Sec. 111.70 Stats.

Dated this _____ day of _____ 1998.

By _____
Sheriff Dean R. McKenzie

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

WALWORTH COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Union contends that the County violated Sections 111.70(3)(a)1, 2 and 3 of MERA by conducting its criminal investigation into Franklin and Strunk's use of the Sheriff Department's computer system. The Union thus points out that no one from the County asked Franklin or Strunk before the County launched its investigation why they had accessed the computer system; that Franklin and Strunk accessed the Sheriff Department's computer system only after Undersheriff Graves gave them permission to do so in 1993-1994 as part of a grievance resolution; that the County was well aware that Graves had given them such permission; and that its continued criminal investigation after Graves acknowledged that fact shows the County's evil intent. The Union also asserts that the County's anti-union stance is reflected by the way that Captain Reiff in 1991 hit then-Union steward Nocek with a bunch of papers; by the way that Lieutenant Starks treated Nocek and Union Staff Representative Rodenstein at a 1993 investigatory meeting; by the fact that it decided to conduct its 1996 investigation immediately after Franklin and Strunk had written letters to the editor which complained about the Sheriff Department's management; and by the fact that it did not conduct another criminal investigation into why two other Sheriff Department employes had accessed the County's computerized tax records without permission to do so.

The County, in turn, denies any illegal conduct by claiming that the Union's allegations relating to Captain Reiff and Lieutenant Starks predate MERA's one (1) year statute of limitations set forth in Sections 111.70(4) and 111.07(14); that "the record is devoid. . ." as to how its 1996 criminal investigation "actually intimidated either Ms. Franklin or Ms. Strunk"; that when the investigation was initiated, neither Welch nor Reiff knew that Graves had earlier given permission to Franklin to access the Sheriff Department's computer files; and that its "use of an outside law enforcement agency can hardly be viewed by a reasonable person to be intimidation." The County also argues that an outside criminal investigation was necessitated by the United States Supreme Court's decision in GARRITY V. NEW JERSEY, 385 U.S. 493 (1967); that it in the past has conducted other outside criminal investigations under similar circumstances; and that the investigation here "was nothing more than a routine and proper series of events which occurred within the County's duty to preserve the confidentiality of its records."

DISCUSSION

The most notable aspect of the County's defense is what is not said: i.e., why the County continued its criminal investigation after Undersheriff Graves by letter dated September 3, 1996, informed Franklin that "I will not dispute giving express or implied consent for such viewing. . ." of the computer records in dispute. (Emphasis added). That letter - referenced in Finding of Fact No. 16. supra - was copied to Sheriff McKenzie. At that point, then, Sheriff McKenzie knew that Franklin and Strunk, whose testimony I fully credit, had accessed the computer files only after Graves - as part of a grievance settlement - gave them permission to do so by giving Franklin the password. Indeed, Graves admitted here that he did give them the password. That being so, what else was there to investigate after that point?

Perhaps recognizing that its subsequent indefensible conduct cannot be defended, the County offers no explanation as to why Graves by letter dated October 11, 1996, asked the County's District Attorney to determine "whether Kathy Franklin and/or Dian Strunk can and should be charged with computer crime." When called as a witness, Graves himself offered no explanation as to why it was necessary to conduct a criminal investigation after he acknowledged on September 3, 1996, that Strunk and Franklin did what they did here because he had given them permission to do so.

As a result, even if we were to assume *arguendo* that the County's initial criminal investigation was lawful - which is an issue that need not be decided given the ultimate conclusion herein - the County's continued criminal investigation after September 3, 1996, violated Section 111.70(3)(a)(1) of MERA because it reasonably tended to coerce and intimidate Franklin and Strunk and because it threatened them with criminal prosecution for engaging in concerted, protected activities which Graves himself had earlier approved; i.e. accessing the Sheriff Department's computer files to make sure that vacations were being properly scheduled and in order to schedule grievance meetings.

It therefore is fatuous for the County to claim here that its criminal investigation "can hardly be viewed by a reasonable person to be intimidation." In fact, both Franklin and Strunk credibly testified that they were intimidated, which is why both of them no longer deal with the Sheriff's Department.

Franklin thus testified that she believed the County would not have any problem in charging her with a crime; that "if they could make those charges stick, they would. . ."; and that "they would go to any length that they could to stop me from doing my union business and activity." She added: "I could be in jeopardy of being without a job, being displaced until my union was able to get my job back. That's a frightening thing." Asked how she felt during the investigation, she answered:

> I think I probably went through a myriad and gamut of emotions. I am my sole support. I have to work to maintain myself. I was frightened. I was upset. By virtue of knowing the department as well as I did, I knew what they were capable of even though I had done nothing wrong. I had some real concerns as to where this was going to go even knowing that I hadn't done it. It was a very traumatic period for me.

Strunk testified that she, too, was scared because: "the criminal part itself - that's going to jail, that's hiring a lawyer, that's all those things -- that scared me to death."

More importantly, since an objective test rather than a subjective test must be used in determining whether Section 111.70(3)(a)(1) of MERA has been violated, it should be clear to any reasonable person that being subjected to a criminal investigation is one of the single most threatening devices around. See, for example, MILWAUKEE DEPUTY SHERIFF'S ASSOCIATION V. MILWAUKEE COUNTY, Case 318, No. 46688, MP- 2549, DEC. NO. 27664-A, affirmed by operation of law, DEC. NO. 27664-B) (WERC, 1/93) where this objective test is set forth See, too, BEAVER DAM UNIFIED SCHOOL DISTRICT, Case XI, No. 30779, MP-1415, DEC. NO. 20283-B (WERC, 5/84), wherein the Commission held at page 5: "It is not necessary to prove that Respondent intended to interfere with or coerce employes or that there was actual interference. Interference may be proved by showing that Respondent's conduct had a reasonable tendency to interfere with the employer's [sic] right to exercise MERA's rights." (footnote citations omitted). Indeed, what can be more coercive and more intimidating than to be subjected to possible criminal prosecution for engaging in concerted, protected activities which were previously approved by a supervisor as part of a grievance settlement?

When viewed in this light - which is the only light that can be used - it is clear that the County, through Sheriff McKenzie, engaged in outrageous conduct when he refused to put a stop to the criminal investigation after Graves told him on or about September 3, 1996, that he, Graves, did not dispute Franklin and Strunk's assertion that Graves in 1993-1994 gave them permission to access the computer files. McKenzie's failure to then call off the hounds shows that he at that point was no longer interested in learning the truth about this matter (assuming *arguendo* that was ever his real goal), and that he, instead, wanted the criminal investigation to continue for reasons other than those now stated by the County.

Since McKenzie did not testify, we do not know his true motivation for engaging in such a senseless act. The Union claims that McKenzie called for the investigation because he was unhappy over the highly critical letters that Franklin and Strunk earlier had written over the jail and which are referenced in Findings of Fact 6-8, supra. The timing of the investigation - only several weeks after Strunk wrote her July, 1996 letter to the editor - certainly gives rise to this

suspicion. However, I conclude that the Union has not clearly met its burden of proving McKenzie's discriminatory motive since it is possible that he allowed the investigation to go forward after September 3, 1996, for other, unknown reasons unrelated to union animus.

In this connection, the Union asserts that the County's discriminatory motive can be seen by the way that former Captain Reiff slapped then-Union steward Nocek in 1991 and by the way that the County treated her and Union Staff Representative Rodenstein at a 1993 investigatory meeting. In agreement with the County, I find that these incidents were too far removed in time to establish union animus in this case.

Turning now to the question of remedy, the Union asks for a standard cease and desist order, the posting of a notice, and "any other remedy the Commission deems appropriate." I therefore am issuing the standard cease and desist order and the notice posting requirement referenced on pages 14-15, supra. Since he was personally responsible for what has transpired, McKenzie must personally sign said Notice.

As for any additional remedy, a case can be built for sending a copy of this decision to the local newspapers and local media so that the citizens of Walworth County could learn just how McKenzie called for a continued criminal investigation into activity that his own undersheriff approved years earlier. It may be necessary for them to learn about what has transpired herein so that they can see how their taxes have been wasted and so that they understood that they, too, may be subjected to a criminal investigation at McKenzie's mere whim and caprice. Such public disclosure, however, will have to be made through some other vehicle, as I conclude that I do not have the authority to publicly disseminate this decision in this fashion.

But, there is no need for the Union to pay for any continued litigation costs over this matter. Hence, if the County wishes to engage in frivolous litigation by appealing this decision, I recommend to the Commission that it order the County to pay for all future legal fees and costs incurred by the Union on appeal. I also recommend that if this matter is taken to court, that the Commission then seek full attorney's fees and costs against the County for engaging in frivolous litigation. To do otherwise would only encourage McKenzie to think that there is no cost to his illegal conduct. That is not the message that the Commission should send when the police power has been abused to the extent found here.

Dated at Madison, Wisconsin, this 27th day of April, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner
gjc
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