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-C

Appearances:

Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, by **Attorney Bruce F. Ehlke,** P. O. Box 2155, Madison, Wisconsin 53701, appearing on behalf of Walworth County Courthouse Employees Union Local 1925-B, AFSCME, AFL-CIO.

von Briesen, Purtell & Roper, S.C., by **Attorney James R. Korom,** 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of Walworth County.

ORDER

On April 27, 1998, Examiner Amedeo Greco issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above matter wherein he concluded that Respondent Walworth County had committed a prohibited practice within the meaning of Sec. 111.70(3)(a)1, Stats., when it

> . . . continued its criminal investigation into whether Kathy Franklin and Dian Strunk had improperly gained access to the Sheriff's Department's computer system after Undersheriff David Graves had given them permission to do so.

To remedy this violation, the Examiner ordered Respondent to cease and desist from such conduct and to post a notice to employes.

The Examiner concluded that Respondent had not violated Secs. 111.70(3)(a)2 or 3, or (3)(c), Stats., and therefore dismissed those portions of the complaint.

In his Memorandum, the Examiner concluded with the following two paragraphs:

> 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.

By Order dated May 18, 1998, pursuant to our authority under Secs. 111.70(4)(a) and 111.07(6), Stats., we set aside the Examiner's Findings, Conclusions, and Order with Accompanying Memorandum for the purpose of correcting mistakes therein.

Subsequent to issuance of our Order Attorney Ehlke took over the representation of Complainant's interests in this litigation. Chair Meier then advised the parties that although he and his spouse shared a partial ownership interest in a cottage with one of Mr. Ehlke's law partners, he believed he could fairly and impartially decide this matter. Attorney Ehlke then asked that Chair Meier recuse himself. Chair Meier concluded that his participation was important and appropriate and declined to recuse himself.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards by the Commission and its staff, footnote text is found in the body of this decision.

Pursuant to our May 18, 1998 Order, we hereby make and issue the same Findings, Conclusions, Order and Memorandum issued by the Examiner on April 27, 1998 with the following exceptions:

A. Examiner Finding of Fact 21 is modified to read:

> Inasmuch as Undersheriff Graves had previously approved Franklin and Strunk's use of the computer system, the County's subsequent criminal investigation of said use had a reasonable tendency to interfere with restrain and coerce Franklin and Strunk in the exercise of rights guaranteed by Sec. 111.70(2), Stats.

B. The last two paragraphs of the Examiner's Memorandum are stricken.

Given under our hands and seal at the City of Madison, Wisconsin this 26th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

Paul A. Hahn /s/
Paul A. Hahn, Commissioner

I concur in part and dissent in part.

James R. Meier /s/
James R. Meier, Chairperson

Walworth County

MEMORANDUM ACCOMPANYING ORDER

We have corrected mistakes in the Examiner's decision by: (1) modifying his ultimate Finding of Fact 21 to correctly state the legal standard to be applied to the County's conduct; and (2) deleting that portion of his Memorandum which we find to be inappropriate.

As to the correction of Finding 21, the Examiner found that the investigation was "reasonably intended to" coerce and intimidate Franklin and Strunk from exercising their rights under Sec. 111.70(2), Stats. The correct statement of the operative legal standard is that the investigation had a "reasonable tendency to" coerce or intimidate. GREEN BAY AREA PUBLIC SCHOOL DISTRICT, DEC. NO. 28871-B (WERC, 4/98).

Finally, we strike the last two paragraphs of the Examiner's Memorandum.

Our reading of the record finds insufficient support for the intemperate dicta of the first. In any event, the dicta reflects an unnecessary and unsuitable personalization of this litigation.

We regard the second as an inappropriate intrusion into a party's decision as to whether it wishes to exercise its statutory appeal rights. Imposition on one party of the fees and costs of the other should never be based on whether a party chooses to exercise its statutory rights. If the examiner believed the County's defense to be frivolous in the litigation before him, he should have ordered payment of fees and costs. He made no such order. Nor do we.

Dated at Madison, Wisconsin this 26th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

A. Henry Hempe /s/
A. Henry Hempe, Commissioner

PaulA.Hahn /s/
Paul A. Hahn, Commissioner

**CONCURRING AND DISSENTING OPINION
OF CHAIRPERSON JAMES R. MEIER**

The Respondent did not appeal the Examiner's decision, thus leaving the Commission to wonder whether the Respondent agreed with the Examiner's decision or whether the Respondent would have appealed but for the Examiner's coercive threat to persuade the Commission to charge the Respondent with Complainant's costs. 1/

1/ The full text of Examiner Greco's threat is as follows:

> ***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 seeks 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.***

I write separately to make several observations. First, on appeal, an examiner's findings and decision have no influence beyond what is supported by the record and the law. Our review is *de novo.* CITY OF NEW LISBON, DEC. NO. 28935 (WERC, 10/97); MILWAUKEE VTAE, DEC. NO. 26459-G (WERC, 12/92). That a party or parties could refrain from exercising the right to appeal as a result of coercion by a staff member of the WERC indicates a serious misunderstanding of how we operate. Commissioners were not appointed to the Wisconsin Employment Relations Commission to rubber stamp examiners' decisions or abide coercive restraint of statutory rights. The Examiner's threat was not only "beyond the pale," but hollow as well.

Furthermore, I want the parties and the public to know that the Examiner's objectionable decision containing the threat was initially brought to my attention by two professional WERC staff who believe the decision reflects badly on the WERC. My point is that WERC is largely made up of professionals who are desirous of maintaining the Commission's reputation for professionalism. Therefore, it is a mistake to refrain from appealing or complaining of unprofessional conduct on the theory that the agency will "get even" with the appellant or that the agency will let the offending staff person "get even" with the appellant. The fact is that knowing our culture, an offending staff person will avoid even the appearance of retaliation.

More importantly, it is wrong to refrain from bringing unprofessional conduct to the attention of the agency by appeal or complaint because it denies the agency important information which is needed so that we can improve our services to the public In other words, I believe that a sound argument can be made that recipients of public services have a civic responsibility to report unprofessional conduct.

While it is true that the Commission performs a *de novo* review either on appeal or where it sets aside an examiner's decision on its own motion to correct "mistakes" of fact or law, see LACROSSE FOOTWEAR V. LIRC, 147 WIS.2D 419 (1988), in the absence of an appeal and advocate's argument, the Commission is disadvantaged in forming a neutral opinion on the merits. To anticipate what arguments would be made requires advocacy which is inappropriate for a neutral decisionmaker. Therefore, I comment only on the obvious.

The Examiner excoriated Sheriff McKenzie because ". . . McKenzie called for a continued criminal investigation into activity that his own undersheriff approved years earlier." 2/ The record establishes that the only thing done after Undersheriff Graves remembered that he may have authorized the access to the corrections system was that the investigation report was sent to the District Attorney. In Wisconsin the district attorney is an independent, neutral charging authority, not an investigative agent of the sheriff. It is not the function of a district attorney to continue investigations or to file charges where no crime exists, and neither occurred here.

2/ The full text of Examiner Greco's remarks is as follows:

> ***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.***

I am satisfied that while it may have been better if the Sheriff had not had the report sent to the District Attorney, doing so did not warrant the Examiner's reaction. At all times, the Sheriff acted consistent with the advice received from the Corporation Counsel. Consistent with that advice, the employe conduct in question was investigated by an outside entity whose report was submitted to the appropriate authority for closure.

Finally, I do not concur with my colleagues' conclusion that the Respondent violated Sec. 111.70(3)(a)1, Stats. They fail to take into consideration the "business necessity" exception last enunciated by the Commission in GREEN BAY AREA PUBLIC SCHOOL DISTRICT, DEC. NO. 28871-B (WERC, 4/98). However, as there is no argument from the parties on this issue, I will not hazard further comment.

Dated at Madison, Wisconsin this 26th day of June, 1998.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Meier /s/
James R. Meier, Chairperson

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