STATE OF WISCONSIN:
CIRCUIT COURT BRANCH III:
WALWORTH COUNTY:

LOCAL 1925-B, AMERICAN FEDERATION
OF STATE, COUNTY AND MUNICIPAL
EMPLOYEES, AFL-CIO,

Petitioner,

vs.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

Case No. 98-CV-507
[Decision No. 29123-D]
[NOTE: This document was re-keyed by WERC. Original pagination has been retained.]

MEMORANDUM DECISION ON THE APPLICATION FOR A JUDICIAL REVIEW OF THE DECISION OF THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION OF JUNE 26, 1998, AND MOTION OF THE PETITIONER FOR LEAVE TO PROFFER TESTIMONY IN COURT AND TO TAKE DISCOVERY

I

APPEARANCES

The petitioner, AFSCME Local 1925-B, by its attorneys, Shneidman, Myers, Dowling, Blumenfield, Ehlke, Hawks & Domer, and Bruce F. Ehlke, of Madison, Wisconsin.

The respondent, Wisconsin Employment Relations Commission, in this administrative review proceeding by its attorneys, James E. Doyle, Attorney General, and John D. Niemisto, Assistant Attorney General, of Madison, Wisconsin.

[The respondent Walworth County in the underlying prohibited practices complaint does not appeal nor appear.]

II

PROCEDURAL STATUS

This is a Chapter 227 review, taken by the petitioner, AFSCME Local 1925-B, under §§227.52, 227.53 and 227.57, Wis. Stats., arising from an allegation before the Wisconsin Employment Relations Commission by the local union that the sheriff of Walworth County had engaged in prohibited practices under §111.70(3)(a)(1) (this is within subchapter IV, Municipal Employment Relations].

A complaint had been filed before the Wisconsin Employment Relations Commission (known herein as the commission) on February 24, 1997, which resulted in the commission appointing a hearing examiner. [See the decision of hearing examiner Amedeo Greco of April 27, 1998.] After procedural matters were decided, a hearing was held in Elkhorn, Wisconsin on October 31, 1997, which was adjourned to December 16, 1997. The hearing examiner then issued findings of fact, conclusions of law, where he concluded:

> 1. Respondent Walworth County violated Section 111.70(3)(a)l 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.

The examiner then ordered the county to cease and desist from such conduct.

In his memorandum attached to the decision, captioned Discussion, the hearing examiner rationalized his decision and (in part) stated thus:

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.

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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.

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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.

Then, on May 18, 1998, the commission under its power found in §111.07(6) to "set aside, modify or change any order . . . at any time within 20 days . . ." [See the order of the commission of June 26, 1998] set aside the last two paragraphs (quoted above).

In its memorandum the commission explained:

> 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.

The effect of the order was to uphold the April 27, 1998 order but again to strike the "intemperate dicta".

However, a separate opinion was filed by the commission's chair, James R. Meier. [Two of the three commissioners was enough to constitute a majority.]

In his separate opinion the chair stated:

> The Respondent (Walworth County) 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.
>
> 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. (Cits. omitted)
>
> 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 Examiner excoriated Sheriff McKenzie because ". . . McKenzie called for a continued criminal investigation into activity that his own undersheriff approved years earlier." 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.
>
> 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)l, Stats.

The dissent did not affect the majority's decision, of course, finding a violation by the county. [The order of 6/26/98 goes unappealed by the county.]

Meanwhile, the attorney for the local wrote the general counsel for the commission on June 4, 1998, and asked, "If it is the intention of the commission to review and make any substantive change it (the local) demands to be informed of the identity of the person(s) who have communicated with the commission."

The attorney for the union was asking in effect if there was a violation of:

227.50. Ex parte communications in contested cases

> (1)(a) In a contested case, no ex parte communication relevant to the merits or a threat or offer of reward shall be made, before a decision is rendered, to the hearing examiner or any other official or employe of the agency who is involved in the decision-making process, by:
>
> 1. An official of the agency or any other public employe or official engaged in prosecution or advocacy in connection with the matter under consideration or a factually related matter; or
>
> 2. A party to the proceeding, or any person who directly or indirectly would have a substantial interest in the proposed agency action or an authorized representative or counsel.
>
> (b) Paragraph (a)l does not apply to an advisory staff which does not participate in the proceeding.
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> (2) A hearing examiner or other agency official or employe involved in the decision-making process who receives an ex parte communication in violation of sub. (1) shall place on the record of the pending matter the communication, if written, a memorandum stating the substance of the communication, if oral, all written responses to the communication and a memorandum stating the substance of all oral responses made, and also shall advise all parties that the material has been placed on the record; however, any writing or memorandum which would not be admissible into the record if presented at the hearing shall not be placed in the record, but notice of the substance or nature of the communication shall be given to all parties. Any party desiring to rebut the communication shall be allowed to do so, if the party requests the opportunity for rebuttal within 10 days after notice of the communication.

The response of Attorney Davis [under (2)] was to deny any contact on June 8, 1998. The attorney for the local again wrote on June 11, 1998, clarifying his earlier letter, demanding again

to know if any "person had communicated with the commission about this matter." The response was a denial of June 16, 1998. On June 26, 1998, the findings and order were filed. (See above.)

On July 24, 1998, the general counsel for the commission wrote to the attorney for the local thus:

> After the Commission issued its May 18, 1998 Order for the purpose of "correcting mistakes" contained in Greco's April 27 decision, Chair Meier attended a meeting of the Board of Directors of the Wisconsin School Attorneys' Association to give them a requested update on the Wisconsin Employment Relations Commission. Mr. Korom is on the Association Board and was in attendance at the meeting.
>
> During the meeting, Mr. Korom asked Chair Meier why the Commission had issued the May 18, 1998 Order. Chair Meier replied: "You will know when you get our decision." In response to questions from other Board members, Mr. Korom then went on to describe the Greco decision.
>
> Upon his return from the meeting, Chair Meier advised me and Commissioner Hempe and Hahn of Korom's remark and his response . . . .

The local complains that these communications as alleged constitute ex parte communications under §227.50(l)(a), et. seq., and render the proceedings unfair, §227.57(4).

III

DECISION

The underlying issues between the local union and the county sheriff no longer have relevance. The findings of Hearing Examiner Amedeo Greco goes unappealed as does his conclusion thus:

> 1. Respondent Walworth County violated Section 111.70(3)(a)l 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.

The commission's order of June 26, 1998, in favor of the local goes unappealed thus:

> 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 follow 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.

This is, of course, a Chapter 227 review by this court.

> 227.57. Scope of review
>
> (1) The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, testimony thereon may be taken in the court and, if leave is granted to take such testimony, depositions and written interrogatories may be taken prior to the date set for hearing as provided in ch. 804 if proper cause is shown therefor.

(**) §943.70(2)(a)(3), Stats., makes accessing computer data unlawfully a possible Class D felony (government operations jeopardized). Class D felonies carry penalties of up to five years in prison and a $10,000 fine. §939.50(3) (d).

> (2) Unless the court finds a ground for setting aside, modifying, remanding or ordering agency action or ancillary relief under a

specified provision of this section, it shall affirm the agency's action.

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(4) The court shall remand the case to the agency for further action if it finds that either the fairness of the proceedings or the correctness of the action has been impaired by a material error in procedure or a failure to follow prescribed procedure.

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(10) Upon such review due weight shall be accorded the experience, technical competence, and specialized knowledge of the agency involved, as well as discretionary authority conferred upon it. The right of the appellant to challenge the constitutionality of any act or of its application to the appellant shall not be foreclosed or impaired by the fact that the appellant has applied for or holds a license, permit or privilege under such act.

The commission first raises the issue of whether after all the local is "aggrieved" by the commission's decision. "Aggrieved" is a word of art. To determine if the local is "aggrieved" or has standing under §§227.52 and 227.53, one looks to Town of Delavan v. City of Delavan, 160 Wis. 2d 403 (Ct. App.) 1990, thus at page 409:

> Sections 227.52 and 227.53(l), Stats., govern judicial review of agency determinations. The relevant portions of those statutes provide:
>
> 227.52 Judicial review; decisions reviewable. Administrative decisions which adversely affect the substantial interests of any person, whether by action or inaction, whether affirmative or negative in form, are subject to review as provided in this chapter . . ..

> 227.53 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a

> decision specified in s. 227.52 shall be entitled to judicial review thereof as provided in this chapter.

Further at pages 410-411:

> STANDING TO PETITION FOR REVIEW
>
> A petitioner does not have standing to petition for review of an administrative decision merely because that person requested and was granted an administrative hearing. (Cits. omitted) Rather, the petitioner must be "aggrieved" by the agency decision. Section 227.53(l), Stats.
>
> We apply a two-part test for determining whether a party is aggrieved and thus has standing under secs. 227.52 and 227.53(l), Stats. (Cits. omitted) First, the petitioner must demonstrate that it sustained an injury due to an agency decision. (Cit. omitted) That injury must not be hypothetical or conjectural, but must be "injury in fact." (Cit. omitted) Second, the petitioner must show that the injury is to an interest which the law recognizes or seeks to regulate or protect.

To look no further than the decision in favor of the local would I think make it not possible for the court to examine the record at all.

Section 111.07(4) provides certain remedies to the local, including an order requiring the person to cease and desist or reinstatement. The union officials were not terminated by the county. The sheriff was personally required to sign an admission that a prohibited practice had occurred and was ordered to cease and desist from threatening a criminal investigation of the union officials accessing vacation data in the county's computer.

No other remedy appears available to the court or the commission. I affirm the commission and dismiss the union's petition.

Dated at Elkhorn, Wisconsin, this 25th day of January, 1999.

BY THE COURT:

John R. Race /s/
John R. Race, Circuit Judge

JRR/ jss

cc: Atty. Bruce F. Ehlke
Asst. AG John D. Niemisto