STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CITY OF RACINE, Complainant,

vs.

RACINE POLICE ASSOCIATION, Respondent.

Case 592
No. 59038
MP-3363

Decision No. 29960-B

RACINE POLICE ASSOCIATION, Complainant,

vs.

CITY OF RACINE, Respondent.

Case 594
No. 59271
MP-3686

Decision No. 30060-A

Appearances:

Hostak, Henzl & Bichler, by **Attorney Thomas M. Devine**, 840 Lake Avenue, P.O. Box 516, Racine, Wisconsin 53401-0516, on behalf of the City.

Weber & Cafferty, S.C., by **Attorney Robert K. Weber**, 2932 Northwestern Avenue, Racine, Wisconsin 53404, on behalf of the Association.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Amedeo Greco, Hearing Examiner: The City of Racine ("City"), on July 10, 2000, filed a prohibited practices complaint with the WERC ("Commission"), alleging that the Racine Police Association ("Association"), had committed a prohibited practice by failing to adhere to the terms of a grievance settlement.

On August 22, 2000, the Commission appointed the undersigned to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sections 111.70(4)(a) and Section 111.07, Stats. The Association subsequently filed an Answer that was received on September 26, 2000. The Association on that same day also filed a counterclaim alleging that the City had committed a prohibited practice by discriminating against Association President William Chesen because of his concerted, protected activities. The Association on October 6, 2000, filed a Motion To Stay Deposition involving the scheduled depositions of Chesen and another police officer. Over the City's objection, I granted the stay on October 10, 2000, because the City had failed to make the requisite good cause showing that such depositions were necessary. Hearing was held in Racine, Wisconsin, on October 19, 2000. Both parties filed briefs and reply briefs that were received by December 18, 2000.

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

FINDINGS OF FACT

1. The Association, a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats., represents for collective bargaining purposes certain police personnel employed by the City. At all times material hereto, police officer William Chesen, who has been employed for about 25 years, has served as the Association's President and he has held various other Association positions in the past. Because of his outstanding service record, Chesen received numerous commendations before he became the Association's president.

2. The City, a municipal employer within the meaning of Sec. 111.70(1)(j), Wis. Stats., operates a police department in Racine, Wisconsin. Richard V. Polzin served as the former chief of said police department and he was succeeded by interim Chief Alan D. Baker. Both Polzin and Baker at all times material herein have acted on the City's behalf and have served as the City's agents.

3. The Association and the City recently have had a difficult collective bargaining relationship, with charges and countercharges levied against the other. As president of the Association, Chesen has been at the center of some of these controversies since he has publicly criticized his superiors on various matters and he has publicly opposed the selection of interim Chief Baker to be the new chief of the department. The City has been aware of many, if not all, of these activities.

4. Chesen was the subject of an internal police department investigation in 2000 relating to comments he had made to a local newspaper and he was disciplined for not following correct departmental procedures regarding a check he had received and turned back. He grieved that discipline (Grievance No. 99-17), and appealed it to arbitration. A hearing on that grievance was scheduled for June 20, 2000, before Arbitrator James A. McClimon.

5. Chesen, Attorney Robert K. Weber, and Association officer Donald Veselik on June 7, 2000, met with interim Chief Baker and Attorney William Halsey in the presence of arbitrator/mediator Frederic R. Dichter - who refused to testify in this proceeding - for the purpose of trying to resolve another grievance involving the shift transfer of Officer Phillip Frost. The parties at that time also discussed Chesen's grievance, with mediator Dichter meeting with them in private caucus before bringing them together to sign the finalized document.

6. It is unclear as to exactly what transpired between the parties regarding their efforts to settle Chesen's grievance. Chesen said he asked mediator Dichter whether all investigations into his activities would be ended if he agreed to the City's proposal to lose four hours pay over the newspaper incident. According to Chesen, Dichter spoke privately to the City's representatives and returned to say that there was another investigation; that Dichter was then asked whether Chesen was the "target" of that investigation; and that Dichter left and returned to say there was a "problem with the evidence and the handling of evidence and that I am not specifically the target of that investigation but in fact the entire unit is under investigation. . ." According to Attorney Halsey, he and interim Chief Baker were the first ones to bring to Dichter's attention the fact that Chesen and others were being investigated over another matter. Halsey said that he specifically told Dichter to tell the other side that "there is another matter"; that said disclosure was "Absolutely not" triggered by any inquiry from Dichter; that Dichter then left the room; and that he returned to say "we have a deal" and that the other side was "not worried" about the other investigation.

7. The parties that day agreed to the following memorandum which covered Frost and Chesen's grievances:

SETTLEMENT AGREEMENT

The parties have met and agreed to resolve the following grievances as set forth below:

. . .

Grievance 99-17

1. Grievant Chesen will have 12 hours of pay reinstated and will not receive back the other furs (sic) of pay, already withheld as a result of the incident that led to the grievance.

2. At the end of one year from the date that the setlment (sic) is signed, the loss of pay discipline shall be converted to a written reprimand. This shall not affect the forfeiture of the four (4) hours of pay.

3. The current investigation of grievant that deals with the quotes in the nepaper (sic) shall be closed. No discipline will be imposed. However, grievnat (sic) will issue a memorandum to the employees of the Department.

4. The memo shall indicate that there was a misunderstanding concerning the appllicability (sic) of drug testing policy to Commnad (sic) positions, and that it was always the intent of the policy to include within the definition of police officer the command positions within the Department.

5. The grievance is withdrawn with prejudice.

Grievance 99-20

1. Officer Frost shall be allowed to return to 4th shift for the summer of 2000.

2. When the 2000-2001 school year for the City of Racine begins, Grievant Frost will return to the 2nd shift.

3. The grievance is withdrawn with prejudice.

> 4. This settlement is entered inot (sic) on a non-precedential basis. The fact that the Department has agreed to this settlement shall not be used in any manner in the future. It may not be used in litigation or raised in any discussions that may subsequently arise. This settlement is simply a one-time resolution to a unique set of sacts. (sic)

. . .

8. The parties at that time also orally agreed that the part of the settlement agreement dealing with officer Frost, who was not present, was conditioned on his acceptance of those settlement terms.

9. Shortly after the June 7, 2000, meeting ended, Chesen met with Lieutenant James Dobbs, his unit commander for the street crimes unit, who told him that he was the target of an ongoing investigation into how he handled evidence in his locker when he was in the detective bureau and that no one else from the street crimes unit was under investigation. Chesen subsequently was charged with violating department rules involving the evidence locker and two other officers were also disciplined over that matter. Chesen was informed by letter in July or August, 2000 that the entire detective bureau was being investigated. In fact, it appears that only two other officers were being investigated. Other officers were not investigated because they had been told ahead of time to clear out their lockers. Chesen was not given that advance notice because he was on another shift.

10. After the June 7, 2000 meeting, Attorney Weber on the Association's behalf prepared the following letter for Chesen's signature which was never signed or sent:

> Police Chief Alan D. Baker
> Racine Police Department
> 730 Center Street
> Racine, Wisconsin 53403-1186
>
> RE: Grievance Settlement #99-17
>
> Dear Chief:
>
> Pursuant to the settlement agreement in the referenced matter, I am writing to confirm the fact there was a misunderstanding concerning the applicability of the random drug testing policy to command officer positions.

> Some time around February 9, 2000, I requested Mike Kothe – the Association's representative on the committee charged with formulating Policy #109 – to try and amend the language existing in the Milwaukee Police Department policy, to-wit: "Officers of all ranks will be tested in such numbers as to ensure that a credible deterrent exists to illegal drug use." I did so because more than one RPA member had approached me regarding the question of whether "officers of all ranks," included members of the command staff.
>
> As stated in your memorandum of April 27, 2000 (attached hereto), the Milwaukee language was then modified by the addition of the words ". . . from Patrolman to Chief of Police." Such language cleared up the existing ambiguity.
>
> I trust this letter clears up the misunderstanding. As you know, I am adamantly opposed to the use of controlled substances and did not even participate on the committee because I was concerned that I could not be objective with regard to the language.

11. Chesen subsequently informed the City that he would not adhere to the terms of that Agreement which pertained to his grievance and that he would not send out the memo referenced in paragraph 4 therein dealing with the applicability of the drug testing policy to command positions because he was misled on June 7, 2000, into believing that all other members of the street crime unit were being investigated for another matter, when, in fact, only a few members of the detective unit were being investigated.

12. Chesen by letter dated June 12, 2000, informed Captain Carl Pavilonis:

. . .

> Reference: Individual Evidence Locker Investigation
> Dear Sir,
>
> On O6-07-00, while attempting to mediate a ssettlement to Grievance 99-17, I became aware that an investigation was ongoing into my personal evidence storage locker in the Detective Bureau. The Acting Chief made reference to this investigation in such a way that when the information was passed on to me, I was led to believe this was an investigation of all the members of the S.C.U. On that day I spoke to Lt. Dobbs who informed me that the matter under investigation only involved myself and no other S.C.U. personnel.

> On 06-09-00, while in a meeting with the Acting Chief and Inspector Constable, I asked what matter was really under investigation and Acting Chief Baker stated that all he knew was this investigation had been going on for three months or more. The Acting Chief stated he knew none of the particulars and that if I had any questions I should contact you.
>
> I am curious as to why this matter has been under investigation for so long without my being informed. We had an agreement with Command that all Officers of the Racine Police Department would be told when investigations began and ended. The only exception to this is of course when the violation is criminal and on going. From what little I have been able to learn this investigation is about items stored in my personal evidence locker which, I may add, I have not been inside of since 1998 until 06-09-00.
>
> Please advise me if there is an investigation going into some alleged wrong doing by me. Also, please note that I have cleaned out my personal storage locker and I believe some items have been removed from it without my consent. Please give me a list of all items which you had removed so that I may determine if a loss of my personal property has occurred.

. . .

13. The City at all times material herein has been willing and able to fulfill the terms of the Chesen settlement related above in Paragraph 7.

14. The City previously had agreed with the Association to inform officers as soon as possible when they were being investigated. That was not done regarding the City's investigation into the contents of Chesen's locker.

15. The City's various investigations into Chesen's activities and its discipline of him were not based on union animus.

Upon the basis of the aforementioned Findings of Fact, I hereby make and issue the following

CONCLUSIONS OF LAW

1. The Association did not violate Sections 111.70(3)(b)4 or 6 of the Municipal Employment Relations Act when it failed to adhere to the terms of the June 7, 2000, Settlement Agreement.

2. The City did not discriminate against William Chesen because of his concerted, protected activities and it therefore did not violate Sections 111.70(3)(a)1 or 3 of the Municipal Employment Relations Act when it conducted certain investigations into his activities and/or when it disciplined him.

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

ORDER

1. IT IS ORDERED that the City's complaint alleging that the Association violated Sections 111.70(3)(b)4 and 6 by failing to adhere to the terms of the June 7, 2000, Settlement Agreement be, and it hereby is, dismissed in its entirety.

2. IT IS FURTHER ORDERED that the Association's counterclaim against the City alleging that the City had discriminated against William Chesen in violation of Sections 111.70(3)(a)1 and 3 be, and it hereby is, dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

CITY OF RACINE (POLICE DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

The City claims that the Association violated Sections 111.70(3)(b)4 and 6 of MERA when it refused to adhere to the terms of the signed June 7, 2000, Settlement Agreement because: (1), "Traditional rules of contracts should apply to the interpretation of a settlement."; (2), there was no misrepresentation which led Chasen to sign the Settlement Agreement; (3), there was no mutual mistake between the parties over what it covered; and (4), no proof of contrary intent should be allowed to contradict its written terms. As for the Association's counterclaim that the City has discriminated against Chesen because of his union activities, the City contends there is no proof that either former Chief Polzin or interim Chief Baker bore any hostility against Chesen, and that as a result, "there can be no case under 111.70(3)(a)3, Stats." It therefore asserts that all of its actions directed against Chesen were based on legitimate concerns and that there is no merit to the Association's claim that the bad relationship between the parties has been caused by the City's alleged anti-union hostility.

The Association contends that "grievance settlements are not the type of documents that the law requires to be in writing"; that an exception to the parol evidence rule applies here; and that the full circumstances surrounding the Settlement Agreement must be considered to determine whether it is a binding, legal document. It also maintains that the record establishes "that the acting Chief and his predecessor have targeted the Union President for discipline" in violation of Sections 111.70(3)(a)1 and 3. In support of this allegation, the Association notes that Chesen had a relatively discipline-free record before he became the Association's president; that he thereafter was "engaged in many protected activities in the first 18 months of his presidency"; that Polzin and Baker were aware of those activities; and that the record establishes their hostility and discriminatory motive.

DISCUSSION

To prevail on its counterclaim that the City discriminated against Chesen because of his union activities, the Association must prove that: (1), Chesen was engaged in concerted, protected activities; (2), the City and its agents were aware of those activities; (3), the City was hostile to those activities; and (4), the City's actions against Chesen were based, at least in part, on its hostility to those activities. See TOWN OF SPIDER LAKE, DEC. NO. 28038-A (Greco, 12/94), *affirmed by operation of law*, DEC. NO. 28038-C (WERC, 1995), See, too,

TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77), *affirmed,* DEC. NO. 14783-B (WERC, 1977), which stated that:

. . .

> . . .it is well established that the search for motive at times is very difficult, since oftentimes, direct evidence is not available. For, as noted in a leading case on this subject, SHATTUCK DENN MINING CORP. V. NLRB, 362 F. 2D 466, 470 (9th Cir., 1966):
>
> > Actual motive, a state of mind being the question, it is seldom that direct evidence will be available that is not also self-serving. In such cases the self-serving declaration is not conclusive; the trier of fact may infer motive from the total circumstances proved. Otherwise, no person accused of unlawful motive who took the stand and testified to a lawful motive could be brought to book." Id., at pp. 6-7.

. . .

Here, the Association has proven points 1 and 2 above, as the record establishes that Chesen engaged in extensive union activities and that Polzin and Baker were aware of most, if not all of them. Indeed, the City itself acknowledges that the Association has proven these two elements of its case.

As to points 3 and 4, however, the Association admits that the evidence is "largely circumstantial. . .", regarding the City's alleged discriminatory motive, which is certainly true since there is no direct evidence of any kind that either former Chief Polzin or interim Chief Baker bore union animus against Chesen. Nonetheless, the Association asserts that "It is inconceivable, based on undisputed testimony, that Polzin and Baker would not have been hostile towards Chesen's activities" and that under the adverse inference rule, the City's failure to call them as witnesses "warrants an inference that their testimony would have been adverse to the City."

I disagree. For absent any direct evidence of union animus in this record, and given the City's explanations for doing what it has done (which is not to say that Chesen's grievances are without merit, as that is a separate issue that does not need to be decided in this proceeding), there simply is no proof that the City's actions against Chesen were based on a discriminatory motive even though he has had an outstanding service record and even though he has been disciplined and investigated more times since he became the Association's president. And, while the adverse inference rule certainly is a well-recognized principle, it cannot be applied here because there are no facts and there is no testimony (other than Chesen's own conclusionary opinions which hardly constitute evidence), that needed to be

rebutted by either Polzin or Baker. In other words, since there is no proof of any kind in this record of anti-union hostility, I cannot conclude that it is "inconceivable" that Polzin and Baker did not bear animus against Chesen.

The only proof of union animus cited by the Association therefore rests outside this record in CITY OF RACINE, DEC. NO. 27020-A (7/1992), wherein Hearing Examiner Karen J. Mawhinney found that the City had violated Section 111.70(3)(a)3 of MERA when it removed the name of an employee (not Chesen), from a promotional eligibility list "in part, because of his protected, concerted activity." Id., at p. 42. However, there is no indication that either Polzin or Baker were involved with the discriminatory treatment found in that case. Moreover, while past instances of illegal conduct and a discriminatory motive can be sometimes relied upon to shed light on whether subsequent actions were based upon a similar discriminatory motive, there needs to be some concrete proof that such a motive continues to exist and that it, at least in part, played a role in whatever actions are being challenged. Here, the Association has failed to meet its burden of proving that the actions taken against Chesen were based on union animus, which is why the Association's counterclaim must be dismissed.

Turning now to the City's complaint that the Association violated Sections 111.70(3)(b)4 and 6 by refusing to adhere to the terms of the June 7, 2000, Settlement Agreement, it is undisputed that the Association has failed to carry out the terms of that agreement. The Association thus violated Sections 111.70(3)(b)4 and 6, if one assumes, as does the City, that the Association was legally required to adhere to its terms.

But was it? Chesen testified that he was misled into believing on June 7, 2000, that the only remaining investigation covered all members of the street crime unit and that he assumed the investigation centered on how a bag of marijuana ended up in the back of a squad car. He also testified without contradiction that he spoke to Lieutenant Dobbs, his unit commander, shortly after the June 7, 2000, meeting ended and that Dobbs then told him that he and two other officers were the targets of an ongoing investigation into how he handled evidence in his locker when he formerly served in the detective bureau. His uncontradicted testimony thus shows that he was, indeed, surprised to know that he was the target of another investigation, thereby supporting his claim that he was not presented with accurate information when he agreed to the Settlement Agreement. Chesen also credibly testified that he was fearful of being a target of any such investigation because he believed he was being subjected to disparate treatment because of his union activities. That is why he wanted an assurance on June 7, 2000, that any such investigation did not focus on him.

The City argues that all of this is immaterial under standard principles of contract law which dictate that the terms of the Settlement Agreement cannot be altered by parol evidence and that the Association has not proven that any exceptions to the parol evidence rule apply here. The City further states that overturning the Settlement Agreement based upon a party's claim that it was misled by a mediator who would not testify would doom the "settlement process to failure." It also maintains that Chesen "cannot contend that he was clueless about

the outside circumstances" since he could have done his own "investigation" to "allay his concern" by not agreeing to the Settlement Agreement "until a later date".

The City has provided powerful policy reasons as to why settlement agreements must be followed and enforced, as that is the only way to hold parties to whatever bargains they have signed. Moreover, there is not one iota of evidence showing that the City's representatives on June 7, 2000, ever intended to deceive Chesen and/or the Association's representatives. To the contrary, Attorney Halsey credibly testified that it was the City, and not Chesen, who first broached the subject of another investigation to mediator Dichter. In addition, if Chesen was so concerned about another investigation, it should have been expressly referenced in the Settlement Agreement. Had that occurred, it is possible that this proceeding would not have arisen.

But, there are other factors cutting the other way, with the main one being the City's own failure to inform Chesen much earlier that he was being investigated over the contents of his locker. Both former Inspector John Costabile and Chesen testified without contradiction that the City previously had agreed with the Association to inform officers when they were being investigated over non-criminal matters. Had the City followed that practice here, the confusion over what was said during the June 7, 2000, settlement discussions may have been avoided.

Secondly, while the City asserts that the parol evidence rule must be applied here because none of the exceptions to the rule apply, it is undisputed that the parties on June 7, 2000, orally agreed that the terms of the Settlement Agreement pertaining to Officer Frost would not become operative unless Officer Frost, who was not present, expressly agreed to its terms. That oral agreement establishes that not all of the understandings relating to the terms of the Settlement Agreement were reduced to writing.

Thirdly, and as related above in Paragraph 6, it is not at all clear what exactly transpired over this issue during the June 7, 2000, mediation session. If Attorney Halsey's testimony is credited – and there is no reason it should not be given the highly credible manner in which he testified – Chesen was given precise and correct information over the nature of that investigation. However, Chesen also testified in a credible fashion and there is no clear proof that his version of what he was told by the mediator is untrue. When that is combined with mediator Dichter's refusal to testify here (which is readily understandable since Sec. 904.085(3), Stats. provides that mediators cannot be forced to testify), there simply is no way of knowing exactly what Dichter told Chesen after he, Dichter, had spoken to the City's representatives in private caucus. Hence, it is entirely possible that there was a missing of the minds over this critical information.

In addition, the Association correctly points out that the parol evidence rule is not absolute since it sometimes is proper to go outside the four corners of an agreement and to consider the intent of the parties under certain circumstances pursuant to the case law it cites:

RUSTLER V. CHRISTENSEN, 207 WIS. 326, 241 N.W. 635 (1932); RADFORD V. J.J.B. ENTERPRISES LTD., 163 WIS. 2D 534, 474 N.W. 2D 790 (Ct.App. 1991); D'HUYVETTER V. A.O. SMITH HARVESTORE PRODUCTS, 164 WIS. 2D 306, 475 N.W. 587 (Ct.App. 1991); CHEVRON CHEMICAL CO. V. DELOITTE & TOUCHE, 168 WIS. 2D 323, 483 N.W. 2D 314 (Ct.App. 1992); STEVENS CONSTRUCTION CORP. V. CAROLINA CORP., 63 WIS. 2D 342, 217 N.W. 2D 291 (1974); IN RE: MARRIAGE OF WEBB V. WEBB, 148 WIS. 2D 455, 434 N.W. 2D 856 (Ct.App. 1988); S & M ROTOGRAVURE SERVICE, INC. V. BAER, 77 WIS. 2D 454, 252 N.W. 2D 913 (1997).

None of these cases is directly on point because this case, unlike those, centers on whether the mediator conveyed incorrect information which was reasonably relied upon by Chesen as a condition precedent to signing the Settlement Agreement. Chevron Chemical, supra, is somewhat analogous because it involved an intermediary (an accountant) who presented incorrect information that was relied upon to the plaintiffs' detriment. The Court there ruled that the doctrine of negligent misrepresentation involves four elements: (1), a representation of fact made by the defendant; (2), the representation of fact is untrue; (3), the defendant was negligent in making the representation of fact; and (4), plaintiff's belief that the representation was true and reliance thereupon to plaintiff's damage (footnote citation omitted). 168 Wis. 2D, at 331-331.

But here, there is no proof of any kind that the City either deliberately misled Chesen or that it was the source of the misinformation conveyed to him.

The Settlement Agreement, however, does not need to be examined under the same standards established for business contracts since collective bargaining agreements are not "ordinary bargains of commerce". See 6A Arthur Corbin, Contracts 1421, p. 343 (1962). In addition, it has been held that "the meaning of a writing. . .can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words." PACIFIC GAS & ELECTRIC CO. V. G.W. THOMAS DRAYAGE AND RIGGING CO., 442 P.2D 641, 643 (Cal. 1968). This view is consistent with the Restatement (Second) of Contracts, 202 cmt. a (1981), at 87 which provides that the rules of contract construction "do not depend upon any determination that there is an ambiguity, but are used in determining what meanings are reasonably possible as well as in choosing among possible meanings."

Following this approach here, I conclude that it is proper to look at all of the facts surrounding the execution of the Settlement Agreement, including what the mediator said on the subject of other investigators surrounding Chesen's conduct and including what Chesen believed to be true when he agreed to its terms. Once that is done, it becomes clear that Chesen (and the Association), signed the Settlement Agreement on the mistaken belief that he was not a target of that investigation when, in fact, he was.

Given the City's failure before June 7, 2000, to inform Chesen that he was being investigated – which is something the City had earlier agreed to do with the Association – I find that Chesen justifiably relied on what the mediator told him and that, as a result, he and the Association were not bound to the terms of the Settlement Agreement once he and the Association learned that he was a target of the other investigation. The City's complaint therefore is dismissed in its entirety.

Dated at Madison, Wisconsin this 22nd day of February, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Amedeo Greco /s/
Amedeo Greco, Examiner

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