

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**LINDA GASPER**, Complainant,

vs.

**MILWAUKEE COUNTY AND AFSCME,  
DISTRICT COUNCIL 48, LOCAL 1654**, Respondents.

Case 538  
No. 63108  
MP-4000

**Decision No. 31222-B**

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**Appearances:**

**Linda Gasper**, appearing on her own behalf.

**Gene Holt**, Law Offices of Mark A. Sweet, appearing on behalf of AFSCME District Council 48 and Local 1654.

**Timothy R. Schoewe**, Assistant Corporation Counsel, Milwaukee County, appearing on behalf of Milwaukee County.

**ORDER ON REVIEW OF EXAMINER'S DECISION**

On May 2, 2006, following two days of hearing, Examiner Stuart D. Levitan issued Findings of Fact, Conclusions of Law, and Order Dismissing Complaints in the above-captioned matter. He concluded that the Complainant Linda Gasper (Ms. Gasper) had failed to satisfy her burden of establishing that Milwaukee County (County) and/or AFSCME, District Council 48, Local 1654 (Union) had committed prohibited practices in violation of Secs. 111.70(3)(a) or (b), Stats.

On May 19, 2006, Ms. Gasper filed a timely petition with the Wisconsin Employment Relations Commission (Commission) seeking review of the Examiner's decision pursuant to Sec. 111.07(5) and 111.70(4)(a), Stats. Thereafter, Ms. Gasper submitted written argument in support of her petition on June 26, 2006, the Union submitted a brief on July 24, 2006, and Ms. Gasper submitted a reply on August 15, 2006. On August 24, 2006, Ms. Gasper

No. 31222-B

submitted an "Appeal request for the Addition of Evidence," and the Union and County submitted written responses opposing that request on September 12 and 13, 2006, respectively. On October 2, 2006, Ms. Gasper filed a written response to the Union's and the County's oppositions to her request for the addition of evidence.

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

**ORDER**

- A. The Examiner's Findings of Fact 1 through 36 are affirmed.
- B. The following Findings of Fact 37 and 38 are found:
  - 37. Ms. Gasper was out of work for Family and Medical Leave for two periods, each several weeks in length, one beginning on March 17, 2003 and one beginning January 12, 2004. Each leave was supported by medical notes indicating that Ms. Gasper was suffering from depression and/or panic attacks that she believed were related to her work environment.
  - 38. A grievance Ms. Gasper filed on December 1, 2003, stated, *inter alia*, "if the harassment continues, I will be forced to file state charges." On December 4, 5, 8, 9, 10, and 12, 2003, Ms. Gasper kept a written log of instances in which various managers and/or supervisors visited the file room where she worked by herself, sometimes, in Ms. Gasper's belief, without any apparent purpose. These visits ranged from one to eight times each day.
- C. The Examiner's Findings of Fact 37 and 38 are renumbered 39 and 40, and, as renumbered, are affirmed.
- D. The Examiner's Conclusions of Law 1 and 2 are affirmed.
- E. The Examiner's Order is affirmed.

F. The Commission makes the following supplemental Order:

Ms. Gasper's request for the addition of evidence, filed after the record was closed and the Examiner's decision was issued, is denied.

Given under our hands and seal at the City of Madison, Wisconsin, this 30th day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Chair

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Paul Gordon /s/

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Paul Gordon, Commissioner

**MILWAUKEE COUNTY**

**MEMORANDUM ACCOMPANYING ORDER**  
**ON REVIEW OF EXAMINER'S DECISION**

Ms. Gasper essentially contends that the County, through various supervisors and managers, systematically harassed her and created a work environment that was too stressful in which to work, refused to transfer her to a more satisfactory situation, and ultimately caused her to lose her job, along with significant pension rights and other benefits. She alleges that the County's actions were prohibited practices under Secs. 111.70(3)(a) 1, 3, 4, and 5, Stats., in that they allegedly violated the collective bargaining agreement and were taken in retaliation for her having filed grievances. Ms. Gasper further contends that the Union failed to fairly represent her, in violation of Sec. 111.70(3)(b)1, Stats., by failing to file certain grievances, by refusing to allow her a representative of her own choosing (who had retired) at a grievance meeting, by resolving certain grievances without her acquiescence, and by "allowing" the County's harassment to continue.

The Examiner accurately and thoroughly set forth the various elements of proof that Ms. Gasper would have had to meet in order to prevail in her prohibited practice claims, and we will not recapitulate that information here. The Examiner also made extensive findings of fact, commendably handling a voluminous, difficult, and at times confusing record. We have affirmed his findings as far as they went. In response to Ms. Gasper's arguments in connection with her petition for review, we have supplemented the Examiner's findings as set forth in our Order, above.

We have carefully reviewed both the record and Ms. Gasper's written arguments. We have concluded that, except for the matters referred to in our supplemental findings of fact, the Examiner has adequately and correctly addressed Ms. Gasper's claims.<sup>1</sup>

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<sup>1</sup> While we agree with the Examiner's conclusions and largely agree with his reasoning, there are two aspects of his discussion that we do not endorse. First, we do not share the views he expressed at page 49 of his decision, where he expresses displeasure with the apparent "perjury" of one of the witnesses who testified in conflict with each other, and explicitly encouraged "whoever is telling the truth" to "bring this to the attention of the proper authorities." If conflicting testimony is crucial to the outcome of a case, it is incumbent upon the examiner to try to reach a credibility determination. If the conflicting testimony is not outcome determinative, an examiner may in his discretion choose not to resolve the conflict. In any case, it is unnecessary and inflammatory for an examiner to urge the parties to pursue a perjury claim. In this case, it is not necessary to decide whether or not Ms. Gasper sent Union Chief Steward Ron Hart a thank you letter in May 2003, or whether, as Hart alleged, Gasper left him a racist voice message in January 2004. Whether or not Gasper was pleased with the Union's efforts as of May 2003, she clearly became displeased subsequently. And whether or not Gasper made racist comments and thereby angered Hart, the evidence does not establish that the Union subsequently failed to meet its duty of fair representation towards Gasper. Accordingly, while we do not necessarily agree that either witness was intentionally lying, it is not necessary to resolve the conflicting testimony on these points.

We also do not agree with the Examiner's conclusion that "Hart appears to have violated Section 7 of the Union constitution when he denied Gasper the right to have former steward Scott as a representative at the grievance meeting in January 2004." Examiner's Decision at 50. It is not self-evident from the language in the

As to the matter of Ms. Gasper's medical leaves, the medical information she has submitted apparently was deemed sufficient by the County to justify her leaves of absence. However, these brief and conclusory doctors' notes are hearsay evidence that is otherwise undeveloped on this record. As such, they fall short of establishing that Ms. Gasper's illnesses actually were caused by the County and/or the Union, much less that such "harassment" was in retaliation for her grievances or otherwise actionable under the Municipal Employment Relations Act (MERA).

Similarly, her assertion (in the form of an exhibit containing a contemporaneous log) that several managers or supervisors made one to eight visits to her work location per day during a particular week in December – despite her subjective belief that the visits had no legitimate purpose – does not establish that the visits amounted to harassment, violated the contract, or were in retaliation for her having filed grievances. Ms. Gasper's work location was a records storage area. The evidence does not establish any basis for her assertion/belief that the visits were without legitimate purpose, were unusually numerous, or were made by persons who did not normally visit the records room. For that matter, we would be hard pressed to adopt Ms. Gasper's apparent assumption that supervisors and managers may not visit an employee's work station even if the purpose is simply observation – unless the visits are accompanied by some form of verbal harassment or actual interference with the work being performed there. As the Examiner explained, Ms. Gasper's central allegations against the County, on the one hand, and the Union, on the other, depended ultimately upon proof (by a clear and satisfactory preponderance of the evidence) of bad faith or improper motive. Such a burden is notoriously difficult to meet. While we can understand and sympathize with Ms. Gasper's conviction that such motives were present, on this record her belief is supported by little more than speculation.

We have also denied Ms. Gasper's request to add evidence to the record in connection with her petition for review. As the Union has pointed out in its opposition to her request, the Commission requires that "good cause" be shown before a record may be reopened for additional evidence.<sup>2</sup> The Commission has interpreted "good cause" to satisfy five criteria:

- (a) That the evidence is newly discovered after the hearing.
- (b) That there was no negligence in seeking to discover such evidence.
- (c) That the newly discovered evidence is not cumulative.

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Union's constitution that an employee may select absolutely any person in the world (such as a retired steward) to represent the employee at a grievance meeting. As there is no other evidence shedding light on how this provision has been interpreted and applied, and since (as the Examiner also concluded) this putative error on the Union's part would not comprise a violation of Sec. 111.70(3)(b) anyway, we would withhold offering an opinion regarding such an internal union procedural matter.

<sup>2</sup> In this regard, the Union has cited ERC 18.08(8) of the Commission's recently revamped rules. As the Commission's former rules were in place at the time Ms. Gasper's complaint was filed, it is technically the predecessor rule that applies here, i.e., ERC 10.19. Both the new and the old rule refer to the requirement of "good cause."

- (d) That it is reasonably possible that the newly discovered evidence will affect the disposition of the proceeding; and
- (e) That the newly discovered evidence is not being introduced solely for the purpose of impeaching a witness.

MILWAUKEE COUNTY, DEC. NO. 28754-C (1/98). In this case, Ms. Gasper seeks to introduce evidence about a criminal matter in which one of the Union's witnesses was involved. Her stated objective is to demonstrate that the witness lied in claiming to be at work on a day on which he was actually in court, and hence "will show how cavalier and comfortable [the witness] is in fraudulently altering documents." Gasper Appeal Request at 3. According to Ms. Gasper, she was thwarted in her efforts to obtain this information for submission at the hearing, because the witness in question had ignored her subpoena for time sheets related to the time frame.

The Union contends that Ms. Gasper's request fails to meet four of the five requisite elements, *viz.*, (a), (b), (d), and (e). The Union accurately points out that, as her own subpoena shows, Ms. Gasper was aware of the evidence at the time of the hearing, and her attempt to introduce certain portions (the criminal records) was rejected by the Examiner. The Union also correctly points out that the witness testified at the hearing but Ms. Gasper "negligently" failed to question him about the allegedly fraudulent time sheets. The Union is also correct that Ms. Gasper's sole purpose for offering the information is to impeach the witness's credibility. These are sufficient grounds independently and in combination upon which to deny the request to add the information.

Accordingly, for the foregoing reasons, Ms. Gasper's request to supplement the record with additional documentary evidence is denied, and the Examiner's decision dismissing her complaint is affirmed.

Dated at Madison, Wisconsin, this 30th day of October, 2006.

Judith Neumann /s/

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Judith Neumann, Chair

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Paul Gordon /s/

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Paul Gordon, Commissioner

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31222-B

