

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**WISCONSIN PROFESSIONAL POLICE ASSOCIATION /
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION, Complainant,**

and

**CITY OF ONALASKA and
CHIEF OF POLICE RANDY A. WILLIAMS, Respondents.**

Case 46
No. 65558
MP-4226

Decision No. 31661-B

Appearances:

Gordon McQuillen, Director of Legal Services, Wisconsin Professional Police Association, 340 Coyier Lane, Madison, WI 53713, appearing on behalf of the Complainant.

Dawn Marie Harris, Attorney at Law, O'Flaherty Heim Egan Ltd., U.S. Post Office Box 1147, La Crosse, WI 54602-1147, appearing on behalf of the Respondents.

**ORDER DEFERRING RULING ON RESPONDENTS' MOTIONS TO DISMISS,
ENTERING A GENERAL DENIAL AND SETTING ADDITIONAL HEARING**

Daniel Nielsen, Examiner: On February 1, 2006, the above-named Complainant, Wisconsin Professional Police Association/LEER Division, filed with the Commission a complaint, alleging that the above-named Respondents, City of Onalaska and Chief of Police, Randy A. Williams, have violated the provisions of Ch. 111.70, MERA, by discriminating against employees on the basis of their involvement with concerted activity, and by interfering with the rights of municipal employees to engage in protected concerted activity. The Commission appointed Daniel Nielsen, an Examiner on its staff, to conduct a hearing and to make Findings of Fact and Conclusions of Law, and to issue appropriate Orders. On May 12 the City filed an Answer to the complaint and Motions to Dismiss. On June 7, the Association amended its complaint, and the City moved to Dismiss the Amended Complaint as well. On June 22, 2006 the Examiner issued his Order Denying Respondent's Motions to Dismiss, and the hearing proceeded on June 27 and 28 in Onalaska, with the Association presenting its case in chief, and the City beginning the presentation of its rebuttal. Additional hearing is scheduled for September 25.

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On August 4, the Association submitted its Second Amended Complaint, alleging that Officer Kevin Johnson had been served with an Order to appear before the Chief of Police for questioning concerning allegedly untruthful testimony he had provided as a witness for the Association in the June 27 and 28 hearings. According to the Second Amended Complaint, Officer Johnson was also relieved of duty, placed on administrative leave and relieved of his badge, Police Department identification and his hand gun. Johnson had also been ordered not to enter the public areas of City Hall without the permission of the Police Chief. The Second Amended Complaint alleged that these acts were retaliation for Officer Johnson's role in filing the original complaint, testifying on the Association's behalf, and making himself available as a rebuttal witness for the hearing on September 25.

On August 8, 2006, the City submitted an Answer, Motion to Dismiss, and Affirmative Defenses to the Second Amended Complaint. The City admitted that Officer Johnson had been ordered to report to the Chief, and had been placed on administrative leave, and relieved of his identification, weapon, badge and police duties. The City alleged that the limits on Johnson's access to public areas of City Hall were due to his history of harassing City employees, and had already been resolved as of time of the filing of the Second Amended Complaint. The Answer asserted that, as a matter of law, the WERC did not have the authority to interfere with the conduct of an internal investigation into the truth or falsity of Johnson's sworn statements, and that no action had yet been taken on the Chief's investigation, as it had not been completed.

On August 15, the Examiner sent an e-mail to the parties, advising them that he intended to take the Motion to Dismiss under advisement:

Dear Counsel:

For much the same reasons articulated in my ruling on the initial Motion to Dismiss, it is my intention to take the current Motion to Dismiss under advisement, allow the merits to be litigated, and withhold judgment until the decision on the case as a whole.

Counsel for the City replied, asking if it was the Examiner's intention to allow the litigation of the new allegations, rather than moving forward with the City's rebuttal case. The Examiner replied by e-mail, stating that it was his intention to allow the new allegations to be litigated on September 25:

Yes – unless I am misreading the amendment and the response, I do not expect that there is a great deal of fact to be litigated on these points beyond the credibility issues that would already have been presented by the testimony to this point. The Chief is currently on the stand in cross by Mr. McQuillen. It appears that the Chief is the one who would be the principle witness to testify about the events underlying the amendment. If you believe this is going to pose a major logistical problem, we can convene a conference call to discuss the order of proceeding.

Counsel for the City responded that she was concerned with the scope of the hearing if the Second Amended Complaint was allowed, and with potential further amendments if the investigation into Officer Johnson's testimony resulted in charges with the Police and Fire Commission:

Just so I am clear, then the issue is narrowed to why Officer Johnson was interviewed last week and not about the content of the interview? How are we going to prevent going into the merits of the bases for that investigatory interview and be able to defend against those claims? Also, I am anticipating that if this is allowed to be added in, then if Police and Fire Commission charges are filed against Officer Johnson in the next two weeks after a full review of additional information and the Union files an amendment on that issue in this forum, (charges that will summarize the investigatory interview from last week) that we will also be trying those issues in this forum in addition to what is mandated by sec. 62.13, Wis. Stats.? This is the very issue that the defense is raising in our Motions to Dismiss. Please advise.

These e-mail exchanges took place between 4:11 p.m. and 4:43 p.m. on August 15. As counsel for the Association had been copied on all of the e-mails, but had to that point not responded, the Examiner proposed hearing from him before continuing with the exchange.

A conference call was held with counsel for each party on Monday, August 21, in the course of which the parties agreed on arrangements to provide a hearing on the Second Amended Complaint and any subsequent amendments without unduly disrupting the proceeding on the original Complaint and the first Amended Complaint. The City, in agreeing to the arrangements, did not waive any argument concerning the viability of the Second Amended Complaint. The results of the call were summarized in an e-mail to the parties that day:

Dear Counsel:

This will confirm our conference call this afternoon.

I reiterated my intent to take the Motion to Dismiss the Second Amended Complaint under advisement, for the same reasons as were articulated in my original ruling on the Motion to Dismiss the Complaint and the Amended Complaint. As it appears likely that there will be further developments and thus further amendments. I advised the parties that I will accept a general denial rather than a formal answer to such amendments. I will also treat the amendments as subject to the City's Motion to Dismiss, to the extent that they implicate the same argument over the exclusivity of the PFC's jurisdiction under Sec. 62.13. Obviously if some completely different matter comes up in an amendment, I will need a detailed answer to that portion of the amendment and a separate Motion to Dismiss, if one is to be made.

We will proceed on September 25th with the complaint as it stood at the conclusion of the last day of hearing. We will reserve one of three days in November – either Friday, November 3; Monday, November 6; or Tuesday, November 7 for an additional day of hearing, if necessary, on the allegations in the Second Amended Complaint and any related amendments that may be forthcoming. That will allow time for the PFC action, if any, and for the generation of a transcript of the PFC hearing. The parties will confer after the PFC hearing about the possibility of stipulations, including the admission of the transcript, which may eliminate the need for the November hearing date.

I should be able to confirm one of the November dates by next Monday.

Please let me know if there is any material misstatement or omission in this summary.

Dan Nielsen

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A Third Amended Complaint was received on September 5, 2006, alleging that Officer Johnson was being charged with making untruthful statements in his June 27th testimony before the Examiner, and by violating a 2002 agreement with the Chief, and subsequent orders from command personnel, by publicly discussing a 2002 complaint of sexual harassment against Johnson by another City employee. The Third Amended Complaint further alleged that the Chief has recommended to the Police and Fire Commission that Officer Johnson be terminated, and the investigation, charges and proposed discipline are all retaliation for his involvement in the prosecution of the pending prohibited practice and other concerted activity.

On the 5th, the Examiner sent an e-mail to the parties, advising them of his intended treatment of the Third Amended Complaint:

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Dear Counsel:

This will confirm the additional hearing if necessary on Tuesday, November 7, 2006. I suggest that we start at 9:00 a.m. in order to be sure that we finish.

I have received the third amended complaint, and I will treat the allegations of a prohibited practice as being denied. If there is a serious, material dispute over the events alleged to have occurred, as opposed to the Association's characterization of those events, Ms. Harris should advise me of that.

In order that the record be clear, I will issue an Order encompassing the discussions we had in our conference call as described below, and the receipt of the third amendment and entry of a general denial. That should go out sometime in the next few days. I will also have the Commission office issue a Notice of Hearing for the 7th. We can cancel that date if we decide that the evidentiary record is sufficient at the end of the day on September 25th.

Dan Nielsen

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On the basis of the foregoing, it is hereby

ORDERED

That the Motions to Dismiss the Second Amended Complaint, and any subsequent, related amendments to the complaint, are taken under advisement pending hearing, and will be addressed in the decision on the original complaint, as amended;

That the Respondent City is deemed to deny any subsequent, related amendments to the complaint, including the Third Amended Complaint and to move their dismissal on the same grounds stated in the Motions to Dismiss the Second Amended Complaint, and that those motions will be taken under advisement;

That evidence related to the allegations in the Second Amended Complaint, the Third Amended Complaint, and any related, subsequent amendments, will be taken through stipulations and, if necessary, in a separate hearing to be held on November 7, 2006, in Onalaska, Wisconsin.

Dated at Racine, Wisconsin, this 8th day of September, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner