STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DISTRICT COUNCIL #48, AFSCME, AFL-CIO, Complainant,

vs.

MILWAUKEE COUNTY, Respondent.

Case 636
No. 67285
MP-4382

Threat of Discipline Against Jacobs

Decision No. 32224-A

Appearances:

John English, Staff Representative, 3427 West St. Paul Avenue, Milwaukee, Wisconsin 53208, appearing on behalf of Milwaukee District Council #48.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North 9th Street, Room 303, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Daniel Nielsen, Examiner: On September 11, 2007, the above-named Complainant, Milwaukee District Council #48, filed with the Commission a complaint, alleging that the above-named Respondent, Milwaukee County, violated the provisions of Ch. 111.70, MERA, by threatening discipline against employee Jeanine Jacob for allegedly false statements included in a grievance filing.

A hearing was held on March 19, 2008, at the Milwaukee County Courthouse, at which time the parties presented such testimony, exhibits, other evidence and arguments as were relevant.[1] The hearing was transcribed and a transcript was received on March 27, 2008. The Union presented its argument orally at the close of the hearing. The County filed a post-hearing brief, which was received by the undersigned on May 2, 2008, whereupon the record was closed. On the basis of the record evidence, the arguments of the parties, and the record as a whole, the Examiner makes and issues the following, Findings of Fact.

[1] The complaint originally alleged violations of Section 111.70(3)(a) 1 and 5. The claim with respect to §5 was dismissed, with the Complainant's acquiescence, at the hearing.

FINDINGS OF FACT

1. Milwaukee County (hereinafter referred to as either the County or the Respondent) is a municipal employer, which provides general governmental services to the citizens of the County. The County's business address is 901 North 9th Street, Milwaukee, WI 53233.

2. Milwaukee District Council 48, AFSCME, AFL-CIO (hereinafter referred to as either the Union or the Complainant) is a labor organization and is the exclusive bargaining representative for, among others, employees in the classification of Human Service Worker.

3. The County and the Union have been parties to a series of collective bargaining agreements, which include the right to file and process grievances on behalf of employees.

4. Jeannine Jacobs has, at all relevant times, been a Human Service Worker for the County's Department on Aging. Human Service Worker is a position in the classified service, and as such is subject to civil service rules. Her immediate supervisor in 2007 was Barbara Wisniewski. Mary Dutkiewicz was the Department's Human Resource Coordinator and Chester Kuzminski was the Department's Resource Center Manager.

5. On her time sheet for the pay period from February 11 through February 24, 2007, Jacobs recorded working 89.0 hours. The time sheet listed 9 overtime hours to be paid, and 2 overtime time hours to be accrued. Wisniewski subsequently sent her an e-mail, questioning the time sheet, since it showed a total of 9 overtime hours worked, and a total of 11 overtime hours to be compensated. Wisniewski followed up with a second e-mail, asking for evidence that the overtime had been authorized in advance. The time sheet was subsequently amended to show 7 hours to be paid, rather than 9 hours, and 2 hours to be accrued.

6. Jacobs was issued a written reprimand for working unauthorized overtime.

7. On August 1, 2007, Jacobs filed two grievances. The first, Grievance No. 39034, alleged that she had "been denied, continually, 9 hours of overtime performed during the pay period 02-11 – 02-24-200" and that overtime was being granted on a selective basis. The second, Grievance No. 39035, alleged "an ongoing and continuing" pattern of harassment, involving "continual monitoring, constant case reviews and an inordinate accounting for time." The second grievance stated that she had been denied overtime that she actually worked, and that she was given a written reprimand for noting overtime on her time sheet.

8. Chester Kuzminski was the designated grievance hearing officer for the Department, and he scheduled a hearing on the two grievances. He conducted a hearing, in the course of which the Union presented Jacobs' claim for overtime, but did not supply documents in support of the claim. Following the hearing, Kuzminski checked the Department's payroll records, and found that Jacobs had been paid for 7 hours of overtime and had 2 hours accrued.

9. On August 22, Kuzminski answered the two grievances. In answer to Grievance 39034, the overtime grievance, Kuzminski wrote:

> Grievant charge that she worked 9 hours of overtime during pay period of 2/11/07 to 2/24/07. She claims she was never paid.
>
> This overtime was unauthorized (i.e. she did not seek prior supervisory approval to work the additional hours). However, county records (attached) show that the grievant was credited for 89 hours of work that pay period (line #1), seven of which were paid (line #2) and two credited as accrued OT (line #6).
>
> Further, grievant received a written reprimand (presented as evidence by the Union at hearing) for working the overtime without "proper authorization." The reprimand also states: "Overtime was not offered to you because you were behind in your case management functions." This clearly indicates why the grievant was NOT authorized to perform overtime and addresses her charge that overtime was, and is, "selectively" offered.
>
> Grievant's requested relief is "reimbursement for 9 hours of overtime."
>
> The grievant's charge of failure to pay overtime is totally false. There is no merit to her other allegations.
>
> As the filing of this grievance appears to violate Civil Service Rule VII, Section 4(n) "Making false or malicious statements, either oral or written, concerning any employee, the County or its policies" this hearing officer must consult with Labor Relations regarding disciplinary action.
>
> This grievance document remains active as a matter for potential disciplinary action.
>
> As a grievance matter, however, this issue is moot.

10. In answer to the harassment grievance (No. 39035), Kuzminski wrote:

> Grievant charges that she is subject to "ongoing and continuing" harassment by her supervisor. She contends this is in the form of continual monitoring, review of casework and accounting for her work time. Union argues that this all stems from the fact that grievant worked 9 hours of overtime in February, 2007 (see grievance 39034) and management refused to pay grievant for this time. Union emphatically argues scrutiny of the worker is retaliation for her continuing to request payment for denied overtime payment.

> As explained in my answer for Grievance 39034, the grievant WAS paid for the 9 hours of overtime (7 hours paid, 2 hours accrued OT) during the pay period in question (Feb. 11-24). Since the grievant's primary accusation against the supervisor is totally false and without merit this hearing officer finds no credibility at all in any of her testimony. Further, the Union's own argument at hearing was repeatedly based on this false accusation. I cannot find any reason to attach any credence to any claim made by the grievant as she boldly and falsely accused the Department of not paying her for work performed when, in fact, we had paid her.
>
> Grievance denied.

. . .

11. On September 11, 2007, the instant complaint was filed, alleging that the August 22 grievance response to the overtime claim constituted interference with protected rights under Section 111.70.

12. On October 2, 2007, Labor Relations Specialist Fred Bau issued his disposition of the Union's appeal on Grievance No. 39035:

> Disposition: The union alleges that the employer has continually harassed the grievant and the harassment has intensified since the grievant filed a grievance over not being paid for nine (9) hours of overtime. The employer indicates that it has only been monitoring the grievant's casework and is attempting to implement a Corrective Action Plan with the grievant, but has been unable to do so. The Union and the grievant are unable to present any creditable evidence that the employer is creating a hostile work environment.
>
> Grievance Denied

13. Jacobs was not disciplined for the content of Grievance No. 39034.

14. The filing of a grievance constitutes lawful, concerted activity for the purpose of collective bargaining or other mutual aid or protection.

15. Answering a grievance by referring the grieving employee for discipline based upon alleged false statements contained in the grievance has a reasonable tendency to interfere with, coerce and restrain employees exercise of the right to file grievances.

On the basis of the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Complainant, Milwaukee District Council 48, is a labor organization within the meaning of Section 111.70(1)(h), MERA.

2. That the Respondent, Milwaukee County, is a municipal employer, within the meaning of Section 111.70(1)(j), MERA.

3. That by the acts described in the above and foregoing Finding of Fact, the County interfered with, restrained and coerced employees in the exercise of their rights guaranteed in Section 111.70(2), MERA.

On the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

It is ORDERED that: the Respondent Milwaukee County shall immediately

1. Cease and desist from threatening employees with discipline on the basis of the County's view of the accuracy of statements of fact contained in grievance filings.

2. Take the following affirmative actions which will effectuate the purposes of the Act:

   a. Notify all employees represented by Complainant, by posting in conspicuous places in its offices and buildings where such employees are employed, copies of the Notice attached hereto and marked Appendix "A". This Notice shall be signed by Chester Kuzminski and Mary Dutkiewicz, or their successors if they are no longer employed, and shall be posted for a period of thirty (30) days thereafter. Reasonable steps shall be taken by the Respondent to ensure that this Notice is not altered, defaced, or covered by other material.

   b. Notify the Wisconsin Employment Relations Commission within twenty (20) days following the date of this Order of the steps taken to comply herewith.

Dated at Racine, Wisconsin, this 1st day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

APPENDIX "A"

**NOTICE TO EMPLOYEES OF
THE MILWAUKEE COUNTY DEPARTMENT ON AGING
REPRESENTED BY MILWAUKEE DISTRICT COUNCIL 48**

Pursuant to an Order of the Wisconsin Employment Relations Commission, and in order to effectuate the purposes of the Municipal Employment Relations Act, we hereby notify our employees that:

WE WILL NOT threaten employees with discipline on the basis of the Department's view of the accuracy of statements of fact contained in grievance filings.

MILWAUKEE DEPARTMENT ON AGING

By _____
Resource Center Manager

By _____
Human Resource Coordinator

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

BACKGROUND

This case involves the County's response to a grievance filing by Human Service Worker Jeannine Jacobs. Jacobs filed a grievance on August 1, 2007 seeking overtime pay for hours worked in February 2007. Chester Kuzminski denied the grievance, stating that Jacobs had, in fact, been compensated for the overtime work, even though she was not authorized to work overtime, and was reprimanded for working unauthorized overtime. Kuzminski's grievance disposition went on to say:

> The grievant's charge of failure to pay overtime is totally false. There is no merit to her other allegations.
>
> As the filing of this grievance appears to violate Civil Service Rule VII, Section 4(n) "Making false or malicious statements, either oral or written, concerning any employee, the County or its policies" this hearing officer must consult with Labor Relations regarding disciplinary action.
>
> This grievance document remains active as a matter for potential disciplinary action.
>
> As a grievance matter, however, this issue is moot.
>
> . . .

The Complainant takes the position that the County intended to, and did, interfere with the rights of employees to file grievances when it threatened Ms. Jacobs with disciplinary action simply for alleging a contract violation. The County did not deny the grievance – it attacked the employee for bringing the grievance. That obviously has a chilling effect on employees, and it chilled this employee, who testified that she was afraid to bring subsequent grievances. The County crossed the line into illegal territory, and it must be stopped before this type of behavior becomes habitual.

The Respondent takes the position that the complaint is without merit and should be dismissed. The employee, Jacobs, filed an overtime claim some six months after allegedly working the time without proper compensation. In fact, the evidence shows that she was properly compensated, and the grievance amounted to a falsehood for the purpose of being

paid twice for the same work. The County is statutorily obligated to take disciplinary action against civil service employees whose conduct merits dismissal or demotion. Employees must be held accountable. Jacobs made false statements in order to secure compensation she did not deserve. The County could not ignore that. The fact that the statements were made on a grievance form is beside the point. The County had a valid business justification for its actions, and it has not, therefore, violated Section 111.70.

DISCUSSION

Section 111.70 (3)(a)1 provides that it is a prohibited practice for a municipal employer individually or in concert with others "To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)." As the Commission noted in its Cedar Grover-Belgium decision: "Violations of Sec. 111.70(3)(a)1, Stats. occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employes in the exercise of their Sec. 111.70(2) rights. If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employe(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights. However, [...] employer conduct which may well have a reasonable tendency to interfere with employe exercise of Sec. 111.70(2) rights will not be found violative of Sec. 111.70(3)(a)1, Stats. if the employer had valid business reasons for its actions."[2] Discussing an employer response which expressed vehement dissatisfaction with a grievance filing, the Commission stated:

> While being exposed to such employer sentiments may, indeed, have a chilling effect upon an employe's willingness to assist a union in general, as well as upon the employe's willingness to support the Union in processing a grievance or complaint, MERA does not protect employes, or unions, from all such effects. It is not unlawful, per se, for an employer to express dissatisfaction, disappointment or unhappiness over the fact that an employe has engaged in protected concerted activity, such as filing grievances or complaints. That is, the employer is not required to continuously wear a happy face. Rather, the prohibition arises when such expressions contain either a threat of reprisal or promise of benefit which would have a reasonable tendency to interfere with, restrain, or coerce municipal employes in the exercise of their rights guaranteed by Sec. 111.70(2), Stats.

In filing her grievance about the overtime dispute, Jacobs was engaged in quintessential protected activity. The issue here is whether Kuzminski's response had a reasonable tendency to interfere with such activity and, if so, whether his response was warranted by valid, good faith business reasons. With respect to the first issue, it is fairly obvious that announcing that

---

[2] CEDAR GROVE-BELGIUM AREA SCHOOL DISTRICT, DEC. NO. 25849-B (5/9/91), (footnotes omitted)

the employer's response to the grievance will be to launch a disciplinary proceeding against the grievant would have a reasonable tendency to interfere with protected activity. The fact that she was not ultimately disciplined is largely beside the point. The direct threat of discipline itself, whether or not it was eventually acted upon, would inevitably chill the willingness of employees to file grievances.

The County's principal argument is that the claim for overtime in the grievance was unfounded because overtime had already been paid and or credited for the nine hours worked in February, 2007. The County argues that it has an obligation to react to misconduct or misfeasance, and thus Kuzminski's statement that he was referring Jacobs for discipline was made in furtherance of a valid business purpose. There are several problems with this analysis.

The first problem is that Kuzminski's grievance response, fairly read, does not allege a scheme by Jacobs to receive pay she is not entitled to. It threatens discipline against Jacobs because he believes her claim that the overtime was not paid is a false statement, which is prohibited by civil service rules: ""Making false or malicious statements, either oral or written, concerning any employee, the County or its policies." A reasonable person reading this grievance response would gather that any grievance containing a statement or claim that the County viewed as false would expose the filer to discipline. Since disagreements over facts are a staple of grievance filings, this application of civil service rules would create trepidation across a broad range of potential grievants, including many with perfectly valid concerns.

Even if I assume that Kuzminski's response was prompted by a perception that Jacobs was trying to dishonestly obtain overpayment for time worked, his grievance answer would still constitute illegal interference. The County certainly has the right to police its payroll operations, and to prevent double payment of time. That is a valid business purpose. The mere existence of a valid business purpose, however, does not grant the County carte blanche to take whatever action it believes might advance that purpose, without regard to its effect on the exercise of protected rights. Where there is a conflict between the protection of employee rights to engage in concerted activity and the pursuit of a valid business purpose, the employer is required to balance its response, so as to avoid unduly interference with employee rights. The Commission described this balance in STATE OF WISCONSIN/DEPARTMENT OF CORRECTIONS, DEC. NO. 30340-B (WERC, 7/04). In that case the Commission ruled that these conflicts must be approached in such as way as to permit both sets of interests to be respected:

> [W]hat are the nature and weight of [the union representative's] statutory interests, does the State have genuine countervailing operational needs, and are those needs being met in a manner that interferes as little as practical with [the union representative's] protected activity?

In simpler terms, the employer may not swat a fly with a sledgehammer, and then excuse the wreckage on the grounds that it has a legitimate interest in swatting flies. Kuzminski's grievance response in this case was a sledgehammer.

Jacobs filed a grievance alleging that she had been denied overtime worked, and that overtime was being assigned selectively. When Kuzminski looked at the records after the grievance hearing, he concluded that she had been compensated for the time. His reaction was apparently to conclude that Jacobs was trying to dishonestly slip one past the County. That is not a particularly reasonable conclusion. Such a scheme would depend for its success on the County not checking with its supervisors, its payroll clerks or its payroll records while it was processing the grievance. Put mildly, this is a farfetched scenario. Threatening discipline for the content of a grievance filing, when the interpretation underlying the discipline requires a fanciful interpretation of the grievant's motives, is a grossly disproportionate interference with the protected right to file a grievance. The rights of the County in this case could have been adequately safeguarded by simply denying the grievance as lacking a factual basis.

Dated at Racine, Wisconsin, this 1st day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel J. Nielsen /s/
Daniel J. Nielsen, Examiner

dag
32224-A