STATE OF WISCOSNIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant,

vs.

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), Respondent.

Case 635
No. 67251
MP-4377

Decision No. 32257-B

Appearances:

Rachel Pings, at the hearing, and **Matthew Granitz,** on the briefs, Cermele & Associates, Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appeared on behalf of the Complainant Association.

Timothy Schoewe, Deputy Corporation Counsel, Milwaukee County, Room 303, 901 North Ninth Street, Milwaukee, Wisconsin 53233, appeared on behalf of the Respondent County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On September 4, 2007, Milwaukee Deputy Sheriffs' Association filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Milwaukee County. The complaint alleged that the County retaliated against Sergeants Curfman and Byers by transferring Curfman out of the training academy and denying Byers a transfer to the training academy because they had filed numerous grievances with the Sheriff's Department involving overtime. The complaint contended that this action, in turn, violated Secs. 111.70(3)(a)1 and 2, Stats. On October 30, 2007, the Commission appointed Sharon Gallagher, a member of its staff, to act as Examiner in the matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Secs. 111.07(5) and 111.70(4)(a), Stats. On November 8, 2007, the County filed an answer denying the allegations. The matter was set for hearing on December 17, 2007, but that hearing date was cancelled. On March 26, 2008, Raleigh Jones was substituted as Examiner in the case. Hearing on the complaint was held on April 23, 2008 in Milwaukee, Wisconsin. At the hearing, the Association amended the complaint to allege a violation of Sec. 111.70(3)(a)3,

Stats., and dropped the Sec. 111.70(3)(a)2, Stats., claim. Following the hearing, the parties filed briefs and reply briefs by June 30, 2008. Having considered the record evidence and arguments of the parties, I hereby make and file the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. Respondent Milwaukee County, hereinafter the County, is a municipal employer with its principal offices located at 901 North Ninth Street, Milwaukee, Wisconsin 53233. The County is the employer of all deputy sheriffs and sergeants in the Milwaukee County Sheriff's Department. At all times material herein, David A. Clarke, Jr. has been Sheriff of Milwaukee County and Inspector Kevin Carr has been second in command in the Milwaukee County Sheriff's Department. These two individuals decide where employees are assigned within the department.

2. Complainant Milwaukee Deputy Sheriffs' Association, hereinafter the Association, is a labor organization with its offices located at 821 West State Street, Milwaukee, Wisconsin 53233. At all times material herein, the Association is, and has been, the certified exclusive collective bargaining representative of all law enforcement employees of the Milwaukee County Sheriff's Department holding the rank of deputy sheriff and sergeant. At all times material herein, Roy Felber has been the Association President. Additionally, Carol Curfman has been one of the Association's five Trustees.

3. The County and the Association have been parties to a series of collective bargaining agreements which govern the wages, hours and working conditions of the employees in the bargaining unit referenced in Finding 2. The parties' most recent collective bargaining agreement was in effect from January 1, 2005 through December 31, 2006.

4. The collective bargaining agreement referenced in Finding 3 contains an overtime provision. That provision is not reproduced here. The collective bargaining agreement contains no reference to any guarantee of assignment, transfer rights, or any promise of where an employee will work, except for shift selection. The shift selection provision is not reproduced here.

5. At all times material herein, Carol Curfman and Sarah Byers have been employed by the Milwaukee County Sheriff's Department as sergeants. As such, they are both in the bargaining unit represented by the Association. Prior to September 2, 2007, Curfman worked at the Department's training academy. She had been there since 2004 and planned on being there until retirement. She has been with the department for about 25 years and is a former high school teacher. Curfman became a sergeant in 1998. She has consistently received good evaluations, including when she was at the training academy. Prior to September 2, 2007, Byers worked in the detention bureau (i.e. the jail). She has been with the department for 14 years and became a sergeant in 1999. She has received good evaluations over the years except for the time when she worked in patrol and her supervisor was Captain

Rodney Richards. Byers has long wanted to work at the training academy. She had made both verbal and written requests to her supervisors to be transferred to the training academy. The training academy is where new deputies and corrective officers are trained. Byers and Curfman considered working at the training academy to be a prestigious assignment within the department which offered opportunity for career and personal growth. Additionally, it is a day shift assignment with a Monday through Friday work week.

6. In 2006, the captain at the training academy asked Byers to come work there (i.e. the training academy), but Byers declined the offer. Her reason for declining the offer (to work at the training academy) was that she felt she needed to stay in the patrol division where she was working at the time and get some additional patrol experience before she moved to the training academy.

7. As noted in Finding 2, Curfman is a trustee with the Association. She has been a trustee for ten years. As a trustee, she can file grievances for, and on behalf of, employees. She has filed many grievances over the years, including when she was at the training academy.

8. In 2007, an issue arose within the department about how overtime was being assigned/distributed. It was the position of Curfman and Byers, as well as the Association, that overtime was not being distributed in accordance with the collective bargaining agreement. Association President Roy Felber talked to the sergeant who was assigning/distributing the overtime, Sergeant Nelson, but the two were not able to resolve the matter. As a result, Felber authorized the filing of grievances over the matter.

9. Curfman and Byers subsequently filed numerous grievances which alleged they were improperly denied overtime. Curfman filed three grievances and Byers filed eight grievances. Curfman's grievances alleged she was improperly denied overtime on April 22 and 28; and May 4, 18, 25 and 26, 2007. Byers' grievances alleged she was improperly denied overtime on May 4, 6, 18, 21, 22, 25, 26, 27 and 28; June 1 and 28; and July 3 and 19, 2007.

10. In August, 2007, Captain Rodney Richards called Curfman. At the time, Captain Richards was the captain in the patrol division. He called Curfman about the overtime grievances she had filed which were identified in Finding 9. While the exact words spoken in the conversation are not contained in the record, the gist of it was that Richards was angry and upset with Curfman for filing the grievances. He yelled at her. The phone call ended when Richards said "go ahead and file your fucking grievance", and then hung up on her.

11. Following this phone call, Captain Richards called Association President Roy Felber. Richards began the phone call by telling Felber – without any context or introduction – that he "needed to control" his girl. Felber asked "what girl" and Richards replied "Curfman". A conversation then ensued between the two (i.e. Richards and Felber) over the pending overtime grievances. Richards asked Felber if he knew about the overtime grievances which had been filed, to which Felber replied in the affirmative. Felber indicated that he had

not only authorized them, but his name was also on the grievances. Felber elaborated by telling Richards that he had had numerous talks with Sgt. Nelson about how overtime was to be distributed and since nothing had been resolved between them, he was finished talking with Sgt. Nelson. Richards told Felber that his ass was getting chewed out from above over the grievances, and he had to put an end to it. Felber replied that he was not going to talk to Curfman and if Richards had a problem with Curfman, he should talk to her himself. The phone call concluded with Richards asking Felber to put a stop to all the overtime grievances; Richards said as union president, Felber could end this (referring to the overtime grievances). Felber declined to drop the grievances and averred they (i.e. the grievances) were justified.

12. On August 8, 2007, Captain Richards called Byers. Richards had been Byers' immediate supervisor when she worked in the patrol division. In the phone call, Richards asked Byers to leave the jail (where she was then working) and come back and work in the patrol division. Byers was perplexed by the request. From her (Byers') perspective, both the call and the request came out of the blue. Aside from that, Byers was surprised by the request because the two of them (meaning Richards and Byers) had had difficulty working with each other. Although Byers had gotten good evaluations from other supervisors, that was not the case with Captain Richards. Because of their difficulties working with each other, Richards had Byers transferred from the patrol division to the jail in 2006. Given that history, Byers wondered why he wanted her back. Richards also told Byers that if she did come back to patrol, he wanted her to voluntarily work a swing shift that incorporated both the second and third shifts. At the time, Byers was working the first shift. With regard to the shift, Byers told Richards that she prefers to work the first shift. At the end of the phone call, Byers indicated she would get back to him with a response the next day.

13. Later that day, Byers made an entry in her day book about the phone call referenced in Finding 12. Byers has kept a day book throughout her entire career with the department. In same, she records the events of the day that she considers noteworthy. She wrote the following in her day book about the phone call with Captain Richards:

. . .

> Contacted via phone call transfer from Captain Rodney Richards. The following was stated by Captain Richards:
>
> - Asked if I would consider coming back to patrol.
> - Stated that there were no guarantees nor promises (repeated it again).
> - Stated that, "He has said things in the past and has written things about me and he still stands behind everything."
> - Stated that I am a "highly talented" sergeant. However, "I have things to work on as a person."

- Stated that although he respects the contract, the need of this Agency, needs me, sees me on a different shift other than days.

- I asked him, Richards, since this would be a life change, what shift does he want me to work?

- Richards responded that he wanted me to work a swing shift, second and third.

- I again responded that since this is a life change, I would need some time to think about it.

- Richards asked if 5, five, working days would be enough. I responded that I would just need until tomorrow morning (one day).

- Richards stated that would be fine.

14. On August 9, 2007, Byers called Richards back with a response to his proposal for her to return to patrol. When they spoke, she declined his offer.

15. That same day, Byers made the following entry in her day book about the matter:

> Called Captain Richards at Patrol to respond to 8/8/07 proposal. Captain was not there. I left message w/ Admin. Assistant Nelson.
>
> . . .
>
> Captain Richards returned my call (I took transferred call in 7047 office in front of Lt. Novotny.) I declined. . . to shift. He said okay, thank you.

16. On August 13, 2007, Byers was summoned into a meeting with Inspector Carr, the number two person in the Sheriff's Department. Carr began the meeting, which ultimately lasted for one hour and ten minutes, by telling Byers that the reason she was transferred from the patrol division to the jail is because of the captain in patrol (referring to Captain Rodney Richards). Byers replied that she knew that. Carr then said that he wanted to get her side of the story. Byers replied that that was eight months ago, and that she had written a reply/rebuttal about it at the time. Byers then told Carr that Richards had just asked her to return to patrol. She indicated that given their past difficulties working with each other, she was confused as to why he (Richards) wanted her back in patrol. Carr then segued to another topic. He told Byers that the reason she had been summoned to his office was to find out if she wanted to be transferred to the training academy. Byers replied in the affirmative (meaning yes, she did want to be transferred to the training academy), and noted that she had a transfer request to that effect already on file. Carr then asked rhetorically if he put her out

there (referring to the training academy), was he going to have problems with her. Byers took offense to this question, and responded that she did not realize she was a problem employee. Byers indicated that, to the contrary, her evaluations indicated she had been an exemplary employee except for the one time that Captain Richards evaluated her. Byers then told Carr that she had heard a rumor that the reason there was going to be an opening at the training academy was because Sergeant Curfman was being transferred out of the training academy because she (Curfman) had filed overtime grievances. Carr replied that transfers are not based on grievances. Byers then told Carr that she too had filed multiple overtime grievances. In response, Carr leaned over his desk and asked: "what grievances do you have on file?" Byers then told Carr about some of her pending overtime grievances and the two then discussed how overtime was handled. In the course of that discussion, Carr told Byers that she had blind-sided the sergeant who was assigning the overtime, because she had not given him the opportunity to fix the overtime problem before she filed her grievances. She replied that Association President Roy Felber had already talked to Sergeant Nelson about the overtime matter, to no avail. At the mention of Felber's name, Carr cut Byers off, and said he wasn't talking about him (i.e. Felber). Carr then told Byers that he considered her part of management (i.e. since she was a sergeant), and she should not have gotten sucked into the union. At the end of the meeting, Carr told Byers that her overtime grievances would not play a role in the decision of whether or not she went to the training academy. When the meeting ended, Byers and Carr walked out of Carr's office together. As Byers was walking away, she heard Carr tell his assistant that he wanted to see all the grievances on file immediately.

17. Later that day, Byers made a detailed entry in her day book about the meeting with Carr referenced in Finding 16. The entry was 11 pages long. It was as follows:

Monday, August 13, 2007

0600 Roll Call

No specific assignment prepare for CO Orientation Class

1045 Called by Sgt. Haas to report to Inspector Carr's office ASAP

1100 10-23 Carr's office the following took place

- Sarah, I want to be blunt about things. You know it was the patrol captain who wanted and had you transferred to the jail.

- I am well aware of that.

- Now I have heard only one side of the story and I am here now to get the other side (Carr talking)

- I responded, 8 months later – Did you even read my rebuttal to my evaluation that gave specific incidents, times, dates and days?

- Yes, of course (Carr). By state law, it has to be in your file.

- The reason I was there, in Carr's office, was to find out if I, Sarah, wanted to go, be transferred, to the training academy.

- I responded yes, that I have a request on file and that I have made it known to supervisors that I want to go to the training academy.

- It was at that time that Carr stated, if I put you out there, am I going to have any more problems from you?

- I stated in astonishment I didn't realize I was a problem employee and that I have been an exemplary employee for the past 13 going on 14 years and if you look at all my evaluations there has never been a problem except with the exception of this one Captain, Richards. So maybe the problem lays elsewhere and that should be looked into. I made notification all the way up to my D.I. at that time twice and asked for help. Stating that I was in a hostile work environment and nothing happened. No help was given. Just keep doing your job – and I did.

- Carr stated that he had an open door policy and I never came to him.

- First off I didn't know he had an open door policy plus he and Richards are close friends at least at work and it would have been for lack of a better word bxxching back and forth which I believed was not the professional direction to go. I took it up the chain of command as far as I could.

- Carr then stated that "In 3-4 months am I going to regret putting you out there (academy) because we can't keep you under control?"

- At this point I was frustrated at the motivations, false character representations and the fact that he still 8 months later is not concerned with my side of the story on this hostile work environment with Captain Rodney Richards. I then stated that I was confused because last week Captain Richards calls me out of the blue to consider coming back to patrol and now you, Carr, are asking me if I want to go back to the academy today. But questioning my character's work morale. Carr asked what Captain Richards said to me and I told him the whole conversation including the comment that "I have things to work on as a person" to which Carr responded "Don't we all?" And I also included

the swing shift between 2nd and 3rd, that I would/could not go to days when my seniority would afford me to go. I stated to Carr that I was not able to do 2nd or 3rd due to my lifestyle that I coach and play soccer and that would not be conducive to that, to which Carr responded well, of course not, why should you.

- I then stated that since he, Carr, wanted to be blunt that this is a big agency and rumors run rampant due to the nature of the beast. And the rumor going around is that the reason there is an opening at the training academy is because she has filed grievances and if that is the case I believe it is only responsible for me to inform you that I also have filed multiple grievances regarding the way overtime was handed out this summer.

- Carr responded No Sarah we don't transfer people due to grievances and then he leaned over the table and stated So what grievances do you have you filed (sic)?

- I started to explain what I thought was the easiest, most clear-cut example which was the USBC and how it was supposed to be granted based seniority per day, per shift.

- Carr stated that that doesn't seem fair if one deputy wanted Mon, Tue., Wed. and Thursday he/she would get it over Deputy B. Well then, B. would never get the overtime.

- I replied Deputy B. would have to wait until Deputy A. retired like I had to w/ Hillman.

- Carr then explained that he didn't care how overtime was handed out as long as no one grieved it and he would have to intervene.

- Carr asked if I tried to rectify overtime. Before . . . in question, I responded yes.

- Carr reiterated that I talked to John (Sgt. Nelson) and he didn't change schedule. I further explained that no I talked to my union president, Felber. Carr cut me off stating, "No I'm not talking about Felber." I tried to explain but Carr cut me off stating that I am management. But I said that I am in that union by no choice of mine and when I have no other options, I have to use them. Carr replied that you (me) as management have to not get 'sucked' into the union ways. I tried to explain my situation that being that Felber told John Nelson on 2 occasions that the overtime has to be granted by seniority per day/shift

when the overtime for the USBC was published and I did not receive 2 requested duties and other sergeants with less seniority did. I called the President, Felber, and asked him how the overtime was to be handed out to which he explained that he told John 2 times by seniority. I asked him as my representative of my union what he recommended I do.

1) Try to resolve matter with Nelson before date in question, or
2) Wait until date passes and then grieve it.

Felber response was to wait and grieve it because he told John 2 times how to grant overtime.

- Carr stated that I blind-sided John because I did not give him an opportunity to fix a mistake. I stated that John knew exactly what he was doing and that I was not the only party damaged.

- Carr stated that I should have gone to John or even Captain Richards but then Carr stated well I know in your situation you may not have felt comfortable talking to the captain with your history. I replied that I had no problem talking to the captain for I had to do it many times when I was assigned to patrol to protect my union rights and to receive overtime fairly according to the contract - specifically how overtime was handed out in December of '05.

- Carr then lectured me on management vs. union and that I should of handled this situation differently and again not to get sucked up into the union. How the union has different agendas and then will use issues to raise their agendas and I have to be aware of my position within the agency. And that I should use my position to be a spokesperson to Admin. (Carr) on issues like this to resolve them before grievances are filed. I then responded that I would be happy to be a spokesperson as a matter of fact here are some issues that staff – deputies – have come to me about but I cannot reveal their names because it is not for me to do that but for them to make the decision on making a formal complaint. I stated that the patrol division is run based upon fear and intimidation. Deputies and even sergeants are afraid to bring up issues of contractual fairness for they do not want to be transferred out of patrol and that also if they complain or rather address overtime assignments they fear they won't be given any more assignments in the future. I do not say this out of harsh feelings but out of the reality of the working members of this agency who are not being treated fairly. At that, Carr stated that we have spent enough time on this issue and that was it. Carr assured me that this issue about grievances would not play a role in transfers. Carr

> then followed me out of his office and told the assistant in the middle of the office to get a hold of Marlo Knox and that he, Carr, wanted all the grievances on file immediately and. . .I then exited and did not hear the rest. This meeting ended at 1210 hours (one hour and 10 minutes long). I then returned to the MCJ.

18. In early August, 2007, Sheriff Clarke, Inspector Carr and Deputy Inspector Jerianne Feiten had a meeting. Feiten is in charge of the training academy. At some point during the meeting, Curfman's name arose during a discussion about pending grievances. The Sheriff asked who Curfman was, and Feiten replied that she works at the training academy. The Sheriff's response to Feiten was "not any more."

19. On August 6, 2007, Feiten told Curfman that she was being transferred out of the training academy by the Sheriff over her objection because of (her) grievances. Feiten asked Curfman to recommend her replacement. She did. Curfman recommended Sgt. Vasquez and Sgt. Byers.

20. That same day, Feiten sent the following e-mail to Clarke, Carr and Peter Jaskulski (the supervisor at the training academy);

> Per your request I have put Carol Curfman on the transfer list.
> This will cause a hardship for at least 6 months at the academy.
> We are currently under audit by the State Department of Training and Standards.
> Sgt. Curfman is the only Master Instructor we have on the agency.
> Her career specialty is training.
>
> Two possible replacement names are:
>
> Sgt. Steve Vasquez – he currently holds certifications in Jail Instruction. He will need to be sent to the other disciplines but we can begin using him in the classroom immediately.
>
> Sgt. Sarah Byers – She holds no Jail Certifications and will take 6 months to get up to speed. She holds instructor certifications in Vehicle Contact and Police Recruit training.
>
> Our main issues are:
> 1. In-Service starts in September and contains an EVOC component. Sgt. Curfman is the Master Instructor for EVOC and Vehicle Contacts for our academy. Sgt. Curfman will be needed from whichever bureau she gets assigned to handle a big part of this training. If the other bureau does not send her on straight time the overtime for the academy will go over budget.

2. I designated Sgt. Curfman the WIBERS expert at the academy due to the fact that she has agency experience and understands the inventory process along with the current CAR reporting requirements. In-Service in September is bringing our new RMS on line. We will have to use out of bureau instructors to supplement until the new replacement is up to speed on how the system works. Again, this will require other bureaus to send instructors on straight time.

3. Sgt. Curfman is our primary Jail Certification instructor. While we transition to a new Sergeant it will require Captain Jaskulski to spend more of his time inside the classroom. Deputy Beth Miers is currently training in the Jailor environment but has not yet developed the confidence and expertise to handle the classroom on her own.

Please consider this for future transfers:
The academy is a specialized bureau. It requires a lot of training and certifications to become a qualified instructor. Changing key staff needs careful consideration. I would like this and future changes to be announced 3 – 6 months ahead of time so we can enroll the new training Sergeant in the appropriate certification classes and make transitions smoother.

21. On August 9, 2007, Feiten's e-mail (i.e. the one in Finding 20) was forwarded to Curfman. The record does not identify who forwarded it.

22. On August 16, 2007, Inspector Kevin Carr issued Order No. 1032. That Order indicated that effective September 2, 2007, over two dozen deputies and five sergeants were being reassigned within the department. Curfman and Byers were two of the sergeants who were reassigned. Curfman was reassigned from the training academy to the jail. Byers was reassigned from the jail to the airport. When Byers was transferred to the airport, that was the only bureau in the department in which her seniority did not allow her to work days (meaning the other employees at the airport had more seniority than her).

23. None of the employees who were transferred/reassigned effective September 2, 2007, including Sergeants Curfman or Byers, grieved their transfer/reassignment. Instead, the Association filed the instant prohibited practice complaint.

24. By filing the overtime grievances referenced in Finding 9, Sergeants Curfman and Byers engaged in lawful, concerted activity. Sheriff Clarke and Inspector Carr became aware of the aforementioned grievances, and were hostile toward that activity. Their decision to transfer Curfman and Byers to other assignments in the department effective September 2, 2007 was based, at least in part, on that hostility. As a result, the Employer discriminated against Curfman and Byers in regard to hiring, tenure or other conditions of employment, and interfered with, restrained or coerced Curfman and Byers, and the County's other employees represented by the Association in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

Based upon the foregoing Findings of Fact, the undersigned makes and issues the following

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to hear and decide the instant complaint of prohibited practices against Respondent Milwaukee County arising under the Municipal Employment Relations Act.

2. At all times material herein, Sheriff David A. Clarke, Jr. and Inspector Kevin Carr were acting in their capacity as officers and agents of Milwaukee County.

3. By filing the overtime grievances referenced in Finding 9, Sergeants Curfman and Byers exercised their rights under Sec. 111.70(2), Stats., to engage in lawful, concerted activity.

4. Respondent Milwaukee County, through its officers and agents, Sheriff Clarke and Inspector Carr, discriminated against Sergeants Curfman and Byers in regard to hiring, tenure, or other terms or conditions of employment by transferring them to other assignments in the department effective September 2, 2007. Their transfers were based, at least in part, on Sheriff Clarke's and Inspector Carr's hostility toward Sergeants Curfman and Byers having exercised their right to engage in lawful, concerted activity under Sec. 111.70(2), Stats. This action, in turn, violated Sec. 111.70(3)(a)3, Stats., and derivatively, interfered with, restrained or coerced Sergeants Curfman and Byers, as well as Respondent's employees represented by the Complainant Association, in the exercise of their rights under Sec. 111.70(2), Stats., in violation of Sec. 111.70(3)(a)1, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the undersigned makes and issues the following

ORDER

That the Respondent Milwaukee County, its officers and agents, shall immediately:

(a) Cease and desist from interfering with, restraining or coercing Sergeants Curfman and Byers, or any of its employees represented by the Milwaukee Deputy Sheriffs' Association, in the exercise of their rights guaranteed in Sec. 111.70(2), Stats.

(b) Cease and desist from discriminating against Sergeants Curfman and Byers, or any of its employees represented by the Milwaukee Deputy Sheriffs' Association, for engaging in lawful, concerted activity.

(c) Take the following affirmative action which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

(1) Immediately transfer Sergeants Curfman and Byers to the training academy.

(2) Notify all of its employees in the Milwaukee County Sheriff's Department by posting in conspicuous places where employees are employed in the Department copies of the notice attached hereto and marked "Appendix A". That notice shall be signed by Milwaukee County Sheriff David A. Clarke, Jr., and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for thirty (30) days thereafter. Reasonable steps shall be taken by Milwaukee County that said notices are not altered, defaced, or covered by other material.

(3) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days following the date of this Order, as to what steps have been taken to comply herewith.

Dated at Madison, Wisconsin, this 25th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES
OF THE MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

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

1. WE WILL immediately transfer Sergeants Curfman and Byers to the training academy in conformance with the Order of the Wisconsin Employment Relations Commission.

2. WE WILL NOT interfere with, restrain or coerce Sergeants Curfman and Byers, or any other employees of the Milwaukee County Sheriff's Department in the exercise of their rights pursuant to the Municipal Employment Relations Act.

3. WE WILL NOT discriminate against Sergeants Curfman and Byers, or any other employees of the Milwaukee County Sheriff's Department because of their having exercised their rights pursuant to the Municipal Employment Relations Act.

Dated this _____ day of _____, 2008.

MILWAUKEE COUNTY SHERIFF'S DEPARTMENT

_____
David A. Clarke, Jr.
Milwaukee County Sheriff

THIS NOTICE MUST REMAIN POSTED FOR THIRTY (30) DAYS FROM THE DATE HEREOF AND MUST NOT BE ALTERED OR COVERED BY ANY OTHER MATERIAL.

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

As noted in this decision's prefatory paragraph, the complaint alleged that the County retaliated against Sergeants Curfman and Byers for filing grievances by transferring them to other assignments in the department effective September 2, 2007. The Association contends that the transfers violated Secs. 111.70(3)(a)3 and 1, Stats. The County disputes that assertion.

POSITIONS OF THE PARTIES

Association

The Association's position is that the County violated Sec. 111.70(3)(a)3 when it took "adverse action" against Sergeants Curfman and Byers (i.e. reassigning them within the department) for filing grievances. It makes the following arguments to support that contention.

It begins by reviewing what it considers to be the applicable legal standard. It cites COUNTY OF WAUKESHA, DEC. NO. 30799-A (Burns, 3/2004), for the proposition that in order to prove a (3)(a)3 violation, a complainant must demonstrate the following: (1) the employee was engaged in lawful and concerted activities protected by the Municipal Employment Relations Act; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities.

The Association argues that notwithstanding the County's contention to the contrary, it met its burden of proof and established all four of the requisite elements. Here's why. With regard to the first element, it notes that the grievances which Curfman and Byers filed constituted lawful and concerted activity. With regard to the second element, it avers that the following evidence establishes that the department knew of the grievances. First, Captain Richards called Curfman regarding the grievances. Second, Captain Richards also called Association President Felber regarding same. Third, the grievances were discussed at the management meeting attended by Clarke, Carr and Feiten. Fourth, the grievances were discussed at Byers' meeting with Carr on August 13, 2007. With regard to the third element, the Association asserts that Curfman was transferred out of the training academy "as soon as Sheriff Clarke realized she initiated several grievances", and that Byers was transferred after she met with Carr and they "discussed her role with the union and the grievances she commenced." With regard to the fourth element, it opines that the sheer totality of the evidence establishes that Curfman and Byers' transfers were the result of their filing the overtime grievances. To support that premise, it notes that after Clarke learned who Curfman was and where she was assigned, he directed that she be transferred from the training academy. It also notes that Byers was denied a transfer to the training academy and was

"instead assigned to a position that was more detrimental in that she lost her ability to remain on the day shift."

Next, the Association addresses the County's contention that this dispute should have been grieved rather than litigated as a prohibited practice. It disputes that assertion. In its view, the contractual grievance procedure is to be used only for matters involving the interpretation, application, or enforcement of rules, regulations or the terms of the contract. It avers that here, though, Byers and Curfman do not seek contractual interpretation, nor do they seek application or enforcement. Instead, they petition this examiner to determine that their grievance processing activity was protected under state law and find that the department took adverse employment action against them as a result. Consequently, the Association believes that the case is in the proper forum.

Next, the Association addresses the County's contention that the Sheriff's power/ability to assign personnel is a constitutionally protected and immemorial duty of the sheriff, and as a result, the examiner lacks the authority to assign Curfman and Byers to the training academy. It disputes that assertion and avers that the Sheriff's ability to assign personnel is not accorded constitutional protection. While the County relies on MANITOWOC COUNTY V. LOCAL 986B, 168 Wis. 2D 819 (1992) to support its contention, the Association submits that the County confuses the holding of that case with the facts in the present dispute. According to the Association, "in MANITOWOC COUNTY, the court's holding focused on solely the nature of the job assigned, not the general power of assignment." Here, though, the pending issue involves the general power of assignment, not the nature of the assignment. As the Association sees it, the present dispute more closely aligns with the state supreme court's decision in KOCKEN V. WISCONSIN COUNCIL 40, 2007 WI 72. It asserts that in KOCKEN, the court examined prior decisions addressing whether certain powers of a sheriff were accorded constitutional authority, and found "that administrative functions and internal management are nothing more than mundane and commonplace functions of a sheriff" and thus were not accorded constitutional status. The Association argues that the holding in KOCKEN is dispositive here because the Sheriff's ability to assign personnel is "mundane and commonplace" and "all management level officials within law enforcement agencies have the authority to assign employees." It argues in the alternative that if it is determined that the ability to assign is particular and unique to the office of the sheriff, then the Association contends that constitutional protection does not extend to retaliatory assignments. According to the Association, a retaliatory assignment (i.e. what happened here) is not something immemorial and particular to the office of the sheriff at common law.

In sum, the Association asks that the examiner find that the County committed prohibited practices by its actions here and order the County to take "affirmative action" to remedy that wrongdoing. The remedy which the Association seeks is to have Curfman and Byers transferred/assigned to the training academy. In support thereof, it notes that two years ago, Examiner Shaw found in another Milwaukee County Sheriff's Department case that the County had violated Sec. 111.70(3)(a)3, and the remedy he ordered therein was to restore an

employee to the rank of sergeant with backpay. MILWAUKEE COUNTY, DEC. NO. 31428-D (Shaw, 7/06).

County

The County's position is that it did not commit any prohibited practices when it reassigned Sergeants Curfman and Byers within the department effective September 2, 2007. It makes the following arguments to support that contention.

The County avers at the outset that since this case involves a reassignment of personnel, it should have been litigated via the parties' exclusive dispute resolution mechanism (i.e. grievance arbitration) rather than litigated as a prohibited practice. Building on that premise, the County asks the examiner to not assert jurisdiction over this matter, but instead defer it to arbitration. Additionally, the County complains that "this matter was pushed to hearing before the underlying (overtime) grievances" were litigated and/or resolved.

Next, the Employer disputes the Association's assertion that the transfers which were implemented on September 2, 2007 constituted an "adverse (employment) action." Here's why. First, it emphasizes that nothing in the collective bargaining agreement gives employees the right to pick or name their own assignment within the department. In other words, employees do not get to pick where they work in the department, and transfer rights are not included in the collective bargaining agreement. While Curfman may have wanted to stay at the training academy until retirement and Byers may have wanted to be reassigned to that site, the County puts it this way in their brief: "as in much of life, wishing does not make it so." According to the County, "nothing in their experience or their labor contract calls for such." Second, the County avers that Curfman and Byers were "assigned consistent with expectations set forth in the labor agreement." Third, the County notes that Curfman and Byers were not the only sergeants who were reassigned on September 2, 2007; three others were also reassigned, and their reassignments are not being challenged here.

Next, the County disputes the Association's contention that it violated Sec. 111.70(3)(a)3 by its conduct here. It begins its argument on this matter by reviewing what it considers to be the applicable legal standard for (3)(a)3 retaliation/discrimination claims. It cites MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 Wis. 2D 540 (1967) and STATE DEPT. OF EMPLOYMENT RELATIONS V. WERC, 122 Wis. 2D 132 (1985) for the proposition that to prove a (3)(a)3 violation, the complainant must prove each of the following elements: (1) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (2) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (3) that the employer bore animus toward the activity; and (4) that the employer's adverse action against the employee was motivated at least in part by that animus, even if other legitimate factors contributed to the employer's adverse action.

The County argues that the Association failed to meet its burden of proof, and specifically did not prove employer animosity or any retaliatory action motivated by such an

animus. To support this premise, it cites the following. First, with regard to Byers, it notes that she admitted that Inspector Carr was unaware of her overtime grievances until she brought them to his attention during their meeting. Second, it notes that during that meeting, Carr told Byers that "we don't transfer people due to grievances." Third, it notes that when Byers made her entry in her daybook about their meeting, she did not record the opinion which she expressed at the hearing (i.e. that notwithstanding Carr's statement to the contrary, Carr was indeed going to consider her pending overtime grievances in deciding whether to transfer her to the training academy per her request). Fourth, with regard to Curfman, the County emphasizes that by her own admission, her evaluations did not suffer as a result of her union activities. Fifth, it notes that Curfman has filed grievances after she was transferred out of the training academy, and she does not claim the Employer retaliated against her for filing those grievances.

Finally, in the event that the examiner finds that the Association did prove a (3)(a)3 violation, it's the County's position that the relief which the Association seeks (i.e. the employees' assignment to the training academy) is outside the Commission's jurisdiction. The County cites WISCONSIN PROFESSIONAL POLICE ASS'N (WPPA) V. DANE COUNTY, 106 Wis. 2D 303 and MANITOWOC COUNTY V. LOCAL 986B, AFSCME, AFL-CIO, 168 Wis. 2D 819 (1992) for the proposition that the assignment of personnel is constitutionally reserved to the sheriff (meaning that only the sheriff has the power/ability to assign personnel), and here he decided to assign Curfman to the jail and Byers to the airport. The County contends that the Commission should not interfere with the exercise of the Sheriff's legitimate constitutional authority to make those assignments. According to the County, "what is really being pushed here is an attempt to end run the collective bargaining and legislative process by stealthily seeking to gain by this process what could not be legitimately gained by the contract or in any fashion consistent with Wisconsin law." It therefore asks that the complaint be dismissed.

DISCUSSION

Jurisdiction

I'm first going to address the County's contention that this case should have been litigated via grievance arbitration rather than litigated as a prohibited practice under MERA because that contention essentially challenges whether the Commission has jurisdiction over the instant complaint. Based on the following rationale, I find that the Commission does indeed have jurisdiction to decide the instant dispute. It's easy to see why the County wants to limit the instant dispute to just being a contractual dispute. It's because the Association acknowledges that there is nothing in the collective bargaining agreement which guarantees where employees work within the department, or prohibits the Employer from transferring/reassigning employees within the department. Thus, the collective bargaining agreement allows reassignments and the Employer gets to decide where employees work. On September 2, 2007, the Employer transferred/reassigned about 30 employees, two of whom were Curfman and Byers. None of the employees transferred, including Curfman and Byers, grieved their transfers because, as just noted, the collective bargaining agreement does not give

them a contractual basis for challenging/overturning a transfer. However, even if the Employer is authorized under the collective bargaining agreement to transfer/reassign employees for no reason whatsoever, MERA does not permit such an action if it is motivated, at least in part, by hostility toward the employee having engaged in lawful, concerted activity. (Note: The legal basis for this statement will be elaborated on in the section which follows). In this case, the Association chose to challenge the County's actions on statutory grounds (as opposed to challenging it on contractual grounds), and filed a prohibited practice complaint with the WERC alleging that the Employer's actions in reassigning Curfman and Byers violated MERA. While the sections of MERA alleged to have been violated will be reviewed in the section which follows, it is noted here that Sec. 111.70(4)(a), Stats., gives the Commission the following authority:

> **(4)** POWERS OF THE COMMISSION. The commission shall be governed by the following provisions relating to bargaining in municipal employment in addition to other powers and duties provided in this subchapter:
>
> (a) *Prevention of prohibited practices.* Section 111.07 shall govern procedure in all cases involving prohibited practices under this subchapter except that wherever the term "unfair labor practices" appears in s. 111.07 the term "prohibited practices" shall be substituted.

Section 111.07(1), Stats., provides:

> **111.07 Prevention of unfair labor practices. (1)** Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction.

The provision just cited gives the WERC jurisdiction to decide whether the alleged actions of Milwaukee County constitute prohibited practices within the meaning of MERA.

The complaint alleged that the County violated Secs. 111.70(3)(a)1 and (3)(a)3 by its actions here, so the focus now turns to reviewing the applicable legal framework for those sections.

The Legal Framework

Sec. 111.70(3)(a)1, Stats. provides that it is a prohibited practice for a municipal employer individually or in concert with others:

> 1. To interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2).

Sec. 111.70(2), stats., referred to above, states:

> Municipal employees shall have the right of self-organization, and the right to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection. . .

In order to substantiate an interference charge, a complainant must establish by a clear and satisfactory preponderance of the evidence that the respondent's conduct contained either some threat of reprisal or promise of benefit which would tend to interfere with, restrain or coerce employees in the exercise of their Section (2) rights. BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84). It is not necessary to demonstrate that the employer intended its conduct to have such effect, or even that there was actual interference; instead, interference may be proven by showing that the conduct has a reasonable tendency to interfere with the exercise of protected rights. WERC V. EVANSVILLE, 69 Wis. 2D 140 (1975); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84).

Sec. 111.70(3)(a)3, Stats. provides that it is a prohibited practice for a municipal employer:

> 3. To encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms of conditions of employment; but the prohibition shall not apply to a fair-share agreement.

This section prohibits employment practices which inhibit union activity. A municipal employer violates this section if it discharges, disciplines, transfers, demotes, lays off or otherwise discriminates against an employee in order to discourage union activity or because of union affiliation.

In order to establish a violation of this section, a complainant must establish by a clear and satisfactory preponderance of the evidence all of the following elements: (1) the employee was engaged in lawful and concerted activities protected by MERA; (2) the employer was aware of those activities; (3) the employer was hostile to those activities; and (4) the employer's conduct was motivated, in whole or in part, by hostility toward the protected activities. MUSKEGO-NORWAY C.S.J.S.D. NO. 9 V. WERB, 35 Wis. 2D 540 (1967); EMPLOYMENT RELATIONS DEPARTMENT V. WERC, 122 Wis. 2D 132 (1985); CITY OF MILWAUKEE, ET AL, DEC. NO. 29270-B (WERC, 12/98).

Evidence of hostility and illegal motive (factors three and four above) may be direct, such as with overt statements of hostility, or as is usually the case, inferred from the circumstances. See TOWN OF MERCER, DEC. NO. 14783-A (Greco, 3/77). If direct evidence of hostility or illegal motive is found lacking, then one must look at the total circumstances surrounding the case. In order to uphold an allegation of a violation, these circumstances must

be such as to give rise to an inference of pretext which is reasonably based upon established facts that can logically support such an inference. See COOPERATIVE EDUCATION SERVICE AGENCY #4, ET AL., DEC. NO. 13100-E (Yaffe, 12/77)), AFF'D, DEC. NO. 13100-G (WERC, 5/79).

It is irrelevant that an employer has legitimate grounds for its action, if one of the motivating factors was hostility toward the employee's lawful, concerted activity. See LA CROSSE COUNTY (HILLVIEW NURSING HOME), DEC. NO. 14704-B (WERC, 7/78). In setting forth the "in-part" test, the Wisconsin Supreme Court noted that an employer may not subject an employee to adverse consequences "when one of the motivating factors is his union activities, no matter how many other valid reasons exist" for the employer's actions. MUSKEGO-NORWAY, *supra*, at p. 562. Although the legitimate bases for an employer's actions may properly be considered in fashioning an appropriate remedy, discrimination against an employee due to lawful, concerted activity will not be encouraged or tolerated. See EMPLOYMENT RELATIONS DEPT. V. WERC, *supra*, at p. 141.

The Commission has also concluded that in cases such as this, where the alleged violations are based upon alleged retaliation for engaging in lawful, concerted activity, it is appropriate to apply the traditional four-part analysis under Sec. 111.70(3)(a)3 to the alleged violation of Sec. 111.70(3)(a)1, as well:

> Because retaliation for lawful, concerted activity inherently discourages other employees from engaging in concerted activity, a violation of Section (3)(a)3 is also a violation of Section (3)(a)1.
>
> . . .
>
> In our view, a Section (3)(a)3 type analysis is sufficient and appropriate to apply to alleged violations of Sec. 111.70(3)(a)1, Stats., in cases like the present one, where the essence of the violation lies in the employer's motive for taking adverse action against one or more employees.
>
> . . .

CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03) at p. 15.

Application of the Legal Framework to the Facts

The personnel action involved in this case is the transfer/reassignment of Curfman and Byers which occurred on September 2, 2007. While the County argues that the transfer/reassignment which occurred was not an "adverse (employment) action", I find that even if a transfer/reassignment is permissible under the collective bargaining agreement, it still fits within the proscription of prohibited conduct identified in (3)(a)3 (i.e. "discrimination in regard to hiring, tenure or other terms or conditions of employment").

In this case, the above-noted (3)(a)3 test requires that the Complainant establish: 1) that Curfman and Byers engaged in lawful, concerted activities; 2) that the Respondent knew of that activity; 3) that the Respondent was hostile to it; and 4) that the Respondent's decision to transfer/reassign Curfman and Byers was based, at least in part, on said hostility. If it is established that the transfer/reassignment was in any part motivated by the employee's union activity, then the examiner is obligated to grant appropriate relief.

Based on the rationale which follows, I find that the Complainant Association established all four elements.

Elements one and two are not in dispute. The following review of the record facts shows why. As was noted in Finding 9, in mid-2007, Curfman and Byers filed numerous grievances which alleged they were improperly denied overtime. Those grievances constituted lawful, concerted activities (i.e. the first element). With regard to the second element, the record establishes that Captain Richards knew of the grievances because he called both Curfman and Felber about them. As for Carr's knowledge of the grievances, the Employer notes that Carr did not know about Byers' overtime grievances when they met on August 13, 2007. That's true. However, during the course of that meeting, Byers told Carr about the grievances, and a discussion ensued between them regarding same. Clarke also had knowledge of the grievances referenced in Finding 9 because they were discussed in the management meeting referenced in Finding 18. Thus, all three of the management representatives just referenced (i.e. Richards, Carr and Clarke) had knowledge of the overtime grievances.

Elements three and four are in dispute though, with the County denying hostility toward that union activity and denying that the filing of grievances played any role in the Employer's decision to transfer/reassign Sergeants Curfman and Byers.

The focus now turns to the third element necessary to prove a (3)(a)3 claim, namely hostility. As was noted above, evidence of hostility can be direct or inferred from the circumstances. In this case, both types of evidence exist.

The direct evidence of hostility is attributable to Captain Richards and is found in the phone calls which he made to Curfman and Felber about Curfman's overtime grievances. While Richards did not testify at the hearing, both Curfman and Felber did. Their unrebutted accounts of their phone calls with Richards are described in Findings 10 and 11. The statements which Richards made to Curfman and Felber in those phone calls show his overt hostility against the overtime grievances. That being so, it is held that Richards' statements referenced in Findings 10 and 11 establish overt hostility against the (union) activity of filing the overtime grievances in question.

In so finding, I am well aware that Captain Richards did not make the decision to transfer/reassign Curfman and Byers. That decision was made by Carr and Clarke. However, as the captain in the patrol division, Richards was an agent of the Employer, and for the purpose of this decision, his conduct/hostility can be attributed to the Employer.

Even if Captain Richards' conduct cannot be used to establish hostility on the part of the Employer because he did not make the decision to transfer/reassign Curfman and Byers, there is still evidence of hostility by someone who actually made that decision. I am referring to Carr and what he said to Byers during their August 13, 2007 meeting. While Carr did not testify at the hearing, Byers did. Her unrebutted account of the meeting is described in Finding 16. Additionally, as noted in Finding 17, after the meeting was over, Byers made an 11-page entry in her day book about the meeting. Her entry buttresses her account of the meeting and its length and detail underscores the importance which Byers attributed to the meeting and what transpired there. Two matters were addressed in that meeting which pertain to this discussion about the third element of the (3)(a)3 test. The first matter was Carr's inquiry about what grievances Byers had pending, and his admonition to her that she had blindsided the sergeant who was assigning overtime by (allegedly) not giving him the opportunity to fix the overtime problem before filing her grievances. The second matter was Carr's admonition to Byers that she should not have gotten sucked into the union. I find that these two statements establish Carr's hostility – either directly or circumstantially – against Byers' (union) activity of filing the overtime grievances in question.

The focus now turns to the final element necessary to prove a (3)(a)3 claim, namely illegal motive. As previously noted, in this case this element involves the question of whether the Respondent's transferring/reassigning of Curfman and Byers was motivated, in whole or in part, by hostility towards their union activity.

Normally in (3)(a)3 cases, the Respondent employer offers reasons for why they took the adverse personnel action against the employee, and the examiner then has to decide whether the proffered reasons were genuine or pretextual. In this case though, the Examiner need not make that call. Here's why. As noted earlier, under this collective bargaining agreement, employees do not get to pick their assignment within the department; instead, the Employer gets to make that decision (meaning decide where employees are assigned). That's what happened on September 2, 2007 when the Employer transferred/reassigned about 30 employees, two of whom were Curfman and Byers. When it did that, the Employer did not offer any explanation for the transfers/reassignments which it made. Contractually speaking, it didn't have to. However, while the Employer has the contractual discretion to transfer/reassign employees wherever it wants, it cannot use that discretion as a mask for decisions which interfere or discriminate under MERA. That means that the Employer could not transfer/reassign Curfman and Byers if the decision to do so was motivated, in whole or in part, by hostility towards their union activity (i.e. filing grievances).

As noted earlier, the search for motive can be difficult because oftentimes direct evidence is not available. In this case though, direct evidence is available, at least as it relates to Curfman's transfer. The following facts, taken from Findings 18-20, show this.

In early August, 2007, Clarke, Carr and Feiten (who was in charge of the training academy) attended a meeting. At some point during that meeting, Curfman's name arose during a discussion about pending grievances. Clarke asked who Curfman was, and Feiten

replied that she (Curfman) works at the training academy. Clarke's response to Feiten was "not any more". Following that meeting, Feiten told Curfman that she was being transferred out of the training academy by the Sheriff over her objection because of (her) grievances. Feiten also sent an e-mail to Clarke which began as follows: "Per your request I have put Carol Curfman on the transfer list." The e-mail then went on to say that this action (i.e. transferring Curfman out of the training academy) will cause a hardship for the academy "for at least 6 months" because Curfman "is the only Master Instructor we have on the agency."

The Examiner finds that Clarke's "not any more" statement constitutes direct evidence that Curfman was transferred out of the training academy because of her grievances. It is apparent from the discussion that preceded Clarke's statement that Clarke did not know who Curfman was; that's why he asked Carr and Feiten who she was. It stands to reason that since he did not know who she was, she (Curfman) certainly was not on his (i.e. Clarke's) personal radar screen for transfer. Insofar as the record shows, Curfman was not on Carr's radar screen for transfer either. Nor does the record indicate that anyone else in the department's management wanted her transferred out of the training academy. As for Feiten, it can be assumed from what she subsequently told Curfman and said in her e-mail to Clarke that she (Feiten) did not want Curfman transferred out of the training academy. It follows from the foregoing that Curfman was not transferred out of the training academy at Feiten's request either. This means that Curfman's transfer was implemented solely because of Clarke's "not any more" statement, which was made shortly after Clarke learned of Curfman's overtime grievances. Given that linkage, the Examiner finds that Curfman's transfer was implemented, at least in part, for an improper motive (namely, Curfman's overtime grievances).

That same kind of direct evidence does not exist relative to Byers' transfer. In other words, there is no direct evidence that Byers' transfer (or, more accurately, the fact that Byers was not transferred to the training academy per her request) was based on her union activity. In fact, the Employer notes that during Carr's meeting with Byers, Carr twice said that transfers in the department were not based on grievances. However, Carr's self-serving declaration during that meeting is not conclusive on the matter. As previously noted, the trier of fact may infer motive from the total circumstances. After considering everything that happened at the August 13, 2007 meeting, the Examiner infers an illegal motive for Byers' transfer.

The following discussion explains why. First, Byers was summoned to Carr's office on August 13 for a meeting on short notice. Insofar as the record shows, Byers does not normally have meetings with the number two person in the department, let alone lengthy one-on-one meetings like this one turned out to be. Second, after beginning the meeting by reviewing her transfer out of the patrol division, Carr told Byers that the reason she was in his office was to find out if she wanted to be transferred to the training academy. Byers replied that she did, and that she had made both verbal and written requests to her supervisors to be transferred to the training academy. Much of the discussion that ensued on that topic dealt with Carr's inquiry whether if that happened (i.e. if Byers went to the training academy), would she be a problem to Carr. Third, Carr then inquired about the grievances Byers had filed. During the

discussion that ensued on that topic, Carr admonished Byers for blindsiding the sergeant who had assigned the overtime by (allegedly) not giving him the chance to fix the overtime problem before she filed her grievances. Fourth, from there, Carr segued to the topic of the union in general. During the discussion that ensued on that topic, Carr admonished Byers for getting sucked into the union and union ways. Fifth, when the meeting ended, as Byers was walking away, Byers heard Carr tell his assistant that he wanted to see all the grievances on file immediately. Presumably, Carr got them and reviewed them. Sixth, there's the timing of what happened thereafter. Just three days later (on August 16), the transfer order was issued, and Byers name was on it. However, she was not transferred/reassigned to the training academy as she wanted. Instead, she was transferred to the airport. That was the only bureau in the department in which her seniority did not allow her to work days. Thus, she did not get either the assignment she wanted, or the shift that she wanted. After considering all the foregoing and the total circumstances presented by the instant record, the Examiner draws the inference that Byers' transfer to the airport, rather than to the training academy as she requested, was motivated, at least in part, by hostility towards her past union activity (i.e. her overtime grievances). Said another way, the inference drawn by the Examiner from the record as a whole is that Byers' union activity (i.e. her overtime grievances) cost her the transfer/reassignment to the training academy that she wanted.

Based on the above, the Examiner finds that two of the transfers implemented within the department on September 2, 2007 – specifically Sergeant Curfman's and Byers' – were unlawfully tainted because their transfers/reassignments elsewhere in the department were based, at least in part, on Clarke's and Carr's animus toward their union activity (i.e. their overtime grievances). This is precisely the sort of mixed-motive that the in-part test of MUSKEGO-NORWAY seeks to address. As a result, it is concluded that Clarke's and Carr's actions violated Sec. 111.70(3)(a)3. Having found such a violation, a derivative Sec. 111.70(3)(a)1 violation is also found.

Remedy

Given that finding, the Examiner is obligated to rectify the Employer's misconduct by granting relief in the form of remedial and affirmative orders. In crafting remedies, the Examiner tries to restore the *status quo* and effectuate the purposes of MERA. Remedies for employer discrimination are tailored to the unique kind of discrimination involved. See CITY OF EVANSVILLE, DEC. NO. 24246-A (Jones, 3/88), *aff'd* DEC. NO. 24246-B (WERC, 9/88).

The Examiner orders that Curfman be transferred/reassigned back to the training academy to the position she was in prior to September 2, 2007. No back pay is included in this order because insofar as the record shows, Curfman's transfer out of the training academy did not affect her pay.

The Examiner also orders that Byers be transferred/reassigned to the training academy. In so finding, the Examiner is well aware that this remedy goes beyond the *status quo* because Byers was not working at the training academy prior to September 2, 2007. Be that as it may,

the Examiner finds that this remedy is tailored to the discrimination involved herein (where Byers was not transferred to the training academy per her request because of her union activity). Additionally, the Examiner finds that he is not precluded from ordering this relief to remedy the retaliatory assignment because of the Sheriff's constitutional authority, or the decisions cited by the Employer. No back pay is included in this order because insofar as the record shows, Byers' transfer on September 2, 2007 did not affect her pay.

Dated at Madison, Wisconsin, this 25th day of August, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/
Raleigh Jones, Examiner

REJ/gjc
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