STATE OF WISCONSIN

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-C

Appearances:

Matthew L. Granitz, Cermele & Associates, S.C., Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 25, 2008, Wisconsin Employment Relations Commission Examiner Raleigh E. Jones issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in which he concluded that Respondent Milwaukee County had committed prohibited practices within the meaning of Secs. 111.70 (3) (a) 3 and 1, Stats. by transferring two employees at least in part out of hostility toward their lawful concerted activity under Sec. 111.70(2), Stats. He ordered Respondent to cease and desist from such conduct and to take certain affirmative remedial action.

On September 12, 2008, Respondent County filed a petition for review of the Examiner's decision pursuant to Secs. 111.07 (5) and 111.70 (4)(a), Stats. Respondent County and the Milwaukee Deputy Sheriffs' Association thereafter filed written argument-the last of which was received November 7, 2008.

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

ORDER

A. The Examiner's Findings of Fact and Conclusions of Law are affirmed.

B. The Examiner's Order is affirmed in all respects except that the remedy (and thus the Notice) as to Byers is modified as follows:

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

(a) Cease and desist from interfering with, restraining and 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 Commission finds will effectuate the purposes of the Municipal Employment Relations Act:

1. Immediately transfer Sergeant Curfman to the training academy.

2. If there have been any vacancies in the training academy between September 2, 2007 and December 22, 2008, immediately transfer Sergeant Byers to the training academy. If there have been no such vacancies, upon request of Sergeant Byers, immediately transfer her to the day shift position of her choice and thereafter transfer her to the training academy whenever the first vacancy arises.

3. Notify all employees represented by the Milwaukee Deputy Sheriffs' Association of the Commission's Order by posting copies of the Notice attached hereto as Appendix "A" in conspicuous places where said employees are employed. The Notice shall be signed and posted immediately upon receipt of this Order and shall remain posted for thirty (30) days. Reasonable steps shall be taken to insure that said Notices are not altered, defaced or covered by other material.

4. Notify the Wisconsin Employment Relations Commission and Complainant Milwaukee Deputy Sheriffs' Association in writing within twenty (20) days from the date of this Order as to what steps have been taken to comply herewith.

Given under our hands and seal at the City of Madison, Wisconsin, this 22nd day of December, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

APPENDIX "A"

**NOTICE TO ALL EMPLOYEES
OF THE MILWAUKEE COUNTY SHERIFF'S DEPARTMENT
REPRESENTED BY MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION**

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:

1. WE WILL immediately transfer Sergeant Curfman to the training academy.

2. WE WILL immediately transfer Sergeant Byers to the training academy if there have been any training academy vacancies between September 2, 2007 and December 22, 2008. If there have been no such vacancies, upon request of Sergeant Byers, we will immediately transfer her to the day shift position of her choice and thereafter transfer her to the training academy whenever the first vacancy arises.

3. 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.

4. 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 ORDER ON REVIEW OF EXAMINER'S DECISION

The County challenges the Examiner's decision on the following grounds: (1) the County was denied due process by the Examiner and his decision; (2) the Examiner's decision improperly rejected the County's affirmative defenses; (3) the Examiner's decision as to the County's illegal motivation is not supported by proper or persuasive evidence; and (4) the Examiner's order must be overturned because it exceeds what is necessary to remedy the wrongdoing found to have occurred and conflicts with the Sheriff's constitutional powers.

As to the County's due process argument, the County correctly asserts that due process requires notice of the allegations to be litigated so that there is an opportunity to prepare and defend. See VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03) at p. 18; RACINE SCHOOLS, DEC. No. 20941-B (WERC, 1/85); GENERAL ELECTRIC V. WERB, 3 Wis. 2D 227, 243 (1958). However, the County was not denied due process in this proceeding. The complaint filed on September 7, 2007 clearly alleges that Respondent illegally retaliated against two employees out of hostility toward their grievance activity. Thus, Respondent was on notice as to the allegations that Complainant Association would be seeking to prove and against which Respondent could seek to defend. Respondent elected not to call any witnesses at the April 23, 2008 hearing despite the fact that Inspector Carr and Sheriff Clarke were specifically identified in the complaint as the County agents who acted illegally in this matter. That was certainly Respondent's prerogative. But that litigation choice cannot now be bootstrapped into a persuasive claim of denial of due process and an opportunity for the County to now present testimony from Carr, Clarke or other Respondent witnesses. [1]

As to the County's affirmative defenses, the County contends the Examiner erred by failing to dismiss the complaint because Complainant did not use a contractual grievance arbitration procedure to litigate the contractual propriety of the County's actions. We disagree. First, the only contract in evidence expired by its terms on December 31, 2006 and the action in question took place in September, 2007. Thus, the record does not establish that there was a contractual grievance arbitration procedure in place at the time in question. Second, even if a contractual grievance arbitration procedure was available as a forum to litigate the issue of whether Respondent illegally discriminated against the two employees, [2] the potential or actual

[1] It is noteworthy that Respondent made no due process claim before, during or at the conclusion of the hearing or in its post-hearing argument to the Examiner.

[2] Part 1.02 of the expired 2005-2006 contract does specify that " . . . these rights shall not be used for the purpose of discriminating against any employee or for the purpose of discrediting or weakening the Association."

availability of such a contractual forum does not deprive the Commission of jurisdiction to resolve the statutory issues raised in the complaint. [3] At most, where a contractual grievance arbitration procedure has been initiated, the Commission may chose to defer complaint proceedings pending the outcome of a contractual arbitration process. [4] Even if it chooses to defer, the Commission does not dismiss the complaint but rather retains jurisdiction to insure that the issues are resolved on the merits in a manner that it is consistent with the statutes we administer. [5] If a contractual grievance arbitration procedure is available but has not been invoked, the Commission does not dismiss the complaint but rather proceeds to decide the merits of the statutory issue raised in the complaint. [6] Therefore, the Examiner correctly rejected this County affirmative defense.

The County's other affirmative defenses were: (1) that the relief proposed by Complainant would impermissibly interfere with Sheriff Clarke's constitutional prerogatives and (2) that because the contract did not give employees the right to any particular assignment, the County could not have violated the law by reassigning the two employees. We will address the constitutional argument in the context of our discussion of remedy. As to the County's "right of assignment" affirmative defense, the Examiner correctly held that a facially neutral recognition of an employer's generally unrestricted right to assign employees cannot be interpreted to allow the employer to exercise that right for unlawful reasons, such as hostility toward the exercise of statutorily protected .

As to the County's contention that the evidence presented at hearing does not support the Examiner's finding that the County acted at least in part out of hostility toward the two employees' exercise of their statutorily protected right to file grievances, we affirm the Examiner's findings and conclusions in this regard. The County is correct that the record

---

[3] CITY OF MILWAUKEE, DEC. NO. 14251-B (WERC, 5/77); UNIVERSAL FOODS CORP., DEC. NO. 26197 (WERC, 8/90); STATE OF WISCONSIN, DEC. NO. 31384-B (WERC, 11/05)

[4] BROWN COUNTY, DEC. NO. 19314-B (WERC, 6/83); STATE OF WISCONSIN, *supra*.

[5] BROWN COUNTY, *supra*.; STATE OF WISCONSIN, *supra*. The only exception to this rule is where the complaint alleges a violation of contract (See Sec. 111.70 (3) (a) 5, Stats.) and the contract contains a grievance arbitration provision for the resolution of such contractual disputes. With limited exceptions not relevant here, although we have statutory jurisdiction over the alleged violation of contract claim in the complaint, we elect not to exercise that jurisdiction because the contractual grievance arbitration is presumed to be the exclusive mechanism for resolving such disputes. MAHNKE V. WERC, 66 Wis. 2D 524 (1974); CITY OF MADISON, DEC. NO. 28864-B (WERC, 10/97). Thus, had the instant complaint included a violation of contract allegation under Sec. 111.70(3)(a)5, Stats., and assuming a contract was in effect and contained an applicable grievance arbitration procedure, we would have dismissed that allegation whether or not a grievance had been filed. However, despite the language in Part 1.02 of the contract and an existing contractual grievance arbitration procedure, we would not dismiss the alleged interference (Sec. 111.70(3)(a)1, Stats.) and discrimination (Sec. 111.70(3)(a)3, Stats.) allegations in this case and would, at most, defer further processing until any pending grievance arbitration was completed.

[6] CITY OF MILWAUKEE, DEC. NO. 14251-B (WERC, 5/77)

contains some exonerating evidence, such as Carr's assertions that he did not know of any

grievances and that the County does not make assignments based on grievances. However, we agree with the Examiner that the record contains sufficient countervailing evidence to meet the Complainant's burden of establishing that the County acted at least in part out of hostility toward the grievances filed by Curfman and Byers.[7]

Central to the Examiner's persuasive analysis of the reassignment of Curfman was Sheriff Clarke's remark "not any more" after he learned that Curfman worked at the training academy and had filed grievances. That remark establishes both Clarke's illegal hostility to Curfman's grievance activity and the relationship of that hostility to Curfman's reassignment. While the County is correct that Curfman's long standing union activism has not previously nor since produced adverse action by the County, this law abiding behavior by the County does not overcome the clear illegality of the unrebutted remark made by Clarke. [8]

As to the Examiner's analysis of the reassignment of Byers, he persuasively reasoned as follows:

> 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

---

[7] In affirming the Examiner, we do not rely on that portion of his decision which discusses and relies upon the hostility of Captain Richards. While the Examiner is certainly correct that Richards' remarks demonstrate his illegal hostility, the record does not establish a relationship between that hostility and the decisions made by Inspector Carr and Sheriff Clarke. Thus, while the Examiner was correct in concluding that Richards was an agent of the County, his hostility does not create liability for the County unless he was part of the decision-making process as to the reassignments. We conclude he was not. However, we have retained the Examiner's Findings of Fact as to Richards because they provide context for the critical conversation between Carr and Byers.

[8] The remark was established by the testimony of Curfman as to a conversation she subsequently had with Deputy Inspector Feiten who advised Curfman that she heard the Sheriff make the remark at a meeting between Clarke, Carr and Feiten. The County references this testimony as "hearsay upon hearsay" and suggests that reliance thereon is improper. First, as the County acknowledges, ERC 12.05 and ERC 18.08(6)(c) parallel Sec. 227.45, Stats. and collectively provide that the statutory rules of evidence are not generally applicable to administrative prohibited practice proceedings. Second, if one were to apply the statutory rules of evidence to Curfman's testimony, Sec. 908.01(4)(b), Stats. provides that Curfman's testimony regarding Clarke's statement is not hearsay because it is an "admission by party opponent" and thus is admissible.

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.

We find this analysis to be correct and fully supported by evidence in the record.

Remaining is the County contention that the Examiner's remedy as to Byers is improper as a matter of applicable labor law and as to both Curfman and Byers is improper as a matter of constitutional law.

As to Byers, the Examiner ordered her to be transferred to the training academy because he believed she would have received such a transfer from her jail assignment but for the County's illegal conduct. The County contends this remedy is improper because Byers was not qualified for the training academy assignment and because the Examiner was not thereby restoring the status quo (i.e. returning Byers to the jail) but rather altering same.

As to Byers' qualifications for the academy assignment, we reject the claim that she was not qualified for same. The record establishes that she was offered the training academy assignment earlier in her career and there is no evidence that the qualifications for said assignment have changed. The academy assignment was part of her discussion with Inspector Carr during which he did not express any reservations about her qualifications. Byers was recommended by Deputy Inspector Feiten as a qualified replacement for Curfman. Thus, we conclude she was qualified for the assignment.

The Examiner's alleged alteration of the "status quo" presents a more difficult remedial question. Clearly, Byers was interested in the vacancy at the academy that had been created by the County's unlawful transfer of Curfman, and we are persuaded that, absent Byers' grievance activity, Carr would have awarded that vacancy to Byers. Nonetheless, the County has now been ordered to restore Curfman to the same position that Byers was later unlawfully denied. Both employees were thus retaliated against in relation to the same job. In order to effectuate the purposes of the Municipal Employment Relations Act, both acts of discrimination must be remedied. On the other hand, had the County acted lawfully toward Curfman, she would have kept her academy assignment. It is not clear to us whether or not another academy assignment may have been available for Byers, either at the time the instant case arose or thereafter. We therefore modify the Examiner's Order to require the County to transfer Byers to a position at the academy, if a vacancy occurred there at any time between September 2, 2007 and the date of our Order. If no vacancy has occurred at the academy in that time frame, the County is ordered to restore Byers to a day shift position for which she is qualified and that is acceptable to her, and to offer her the next vacancy that occurs at the academy.

Remaining is the contention that ordering the transfer of employees runs afoul of Wisconsin law that "a sheriff may not be restricted in whom he or she assigns to carry out his or her constitutional duties if he or she is performing immemorial, principal and important duties characterized as belonging to the sheriff at common law." WISCONSIN PROF'L POLICE ASS'N. V. DANE COUNTY, 106 Wis. 2d 303, 312 (1982)(WPPA I). Having reviewed WPPA I, WISCONSIN PROF'L POLICE ASSN./LAW ENFORCEMENT EMPLOYEE RELATIONS DIV. V. DANE COUNTY, 149 Wis.2D 699 (Ct.App. 1989)(WPPA II); MANITOWOC COUNTY V. LOCAL 986B, AFSCME, AFL-CIO, 168 Wis.2D 819 (1992); WASHINGTON COUNTY V. WASHINGTON COUNTY DEPUTY SHERIFF'S ASSN., 192 Wis.2D 728 (Ct.App.1995); DUNN COUNTY V. WERC, 293 Wis.2D 637 (Ct.App. 2006); KOCKEN V. WISCONSIN COUNCIL 40, AFSCME, AFL-CIO, 301 Wis. 2D 266 (2007); and OZAUKEE COUNTY V. LABOR ASSN. OF WISCONSIN, 2007AP1615 (Ct.App. 2008), we are persuaded that our remedial order is constitutionally permissible. As our Court has cautioned most recently in KOCHEN and OZAUKEE COUNTY, care should be taken to avoid "over-constitutionalizing the powers of the office of sheriff, in contravention of the framer's intentions." With this caution in mind, we conclude that the assignment of qualified employees to the training academy is not an "immemorial, principal and important duty

characterized as belonging to the sheriff at common law" but rather is an "internal management and administrative duty" which is not constitutionally protected. It can well be argued that the relatively recent vintage and generic nature of law enforcement training academies put this assignment issue well outside the scope of any common law duty of a sheriff. However, even if this duty falls within the confines of the common law, the Court's holding in DUNN COUNTY regarding the lack of constitutional protection as to patrol assignments persuades us that assignment to the training academy is also a constitutionally unprotected administrative duty. Thus, we reject the County contention that our remedy is impermissible.

Given all of the foregoing, we have affirmed the Examiner.

Dated at Madison, Wisconsin, this 22nd day of December, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Susan J. M. Bauman /s/
Susan J. M. Bauman, Commissioner

gjc