

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**WISCONSIN LAW ENFORCEMENT ASSOCIATION,  
LOCAL 2 and ANDREW STARCH, Complainants,**

vs.

**UNIVERSITY OF WISCONSIN – STEVENS POINT  
PROTECTIVE SERVICES, Respondent.**

Case 826  
No. 69400  
PP(S)-402

**Decision No. 32985-B**

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**Appearances:**

**Sally A. Stix**, Stix Law Offices, Attorneys at Law, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of Wisconsin Law Enforcement Association, Local 2 and Andrew Starch.

**William H. Ramsey**, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, Fourth Floor, P.O. Box 7855, Madison, Wisconsin 53707-7857, appearing on behalf of University of Wisconsin – Stevens Point Protective Services.

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

On October 14, 2010, Wisconsin Employment Relations Commission Examiner Richard B. McLaughlin issued Findings of Fact, Conclusions of Law and Order in the above matter wherein he concluded that the Respondent University of Wisconsin - Stevens Point did not commit an unfair labor practice within the meaning of Secs. 111.84(1)(a) or (c), Stats. by terminating Complainant Andrew Starch. As to the complaint allegation that the Respondent University committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats. by denying Complainant Starch’s request for representation by Complainant Wisconsin Law Enforcement Association, the Examiner ordered that allegation held in abeyance pending completion of a grievance arbitration proceeding.

On October 29, 2010, the Complainants filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner’s decision pursuant to Secs. 111.07(5) and 111.84(4), Stats. The parties thereafter filed written argument in support of and in opposition to the petition-the last of which was received February 15, 2011.

No. 32985-B

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

**ORDER**

- A. Examiner Findings of Fact 1-20 are affirmed.
- B. Examiner Finding of Fact 21 is affirmed with the exception of the last sentence which is modified as follows by deletion of underlined portion thereof:

Rowe's conclusions reflect a good faith evaluation of the incident and are based in fact.

- C. Examiner Findings of Fact 22-24 are affirmed.
- D. Examiner Finding of Fact 25 is affirmed with the exception of the second to last sentence which is modified as follows by deletion of the underlined portion thereof:

Rowe's belief is based on a good faith evaluation of Starch's conduct and is based in fact.

- E. Examiner Finding of Fact 26 is modified to read as follows:

26. Starch engaged in various lawful concerted activity during his employment and Rowe was aware of said activity. Rowe was not hostile thereto. Rowe's decision to terminate Starch during his probationary period was based entirely on Rowe's good faith and unfavorable evaluation of Starch's performance as a police officer.

- F. Examiner Finding of Fact 27 is set aside.
- G. Examiner Conclusions of Law 1-4 are affirmed.
- H. Examiner Conclusion of Law 5 is set aside and the following Conclusion of Law is made:

5. By denying Starch's request that a representative of the Wisconsin Law Enforcement Association be present during an October 20, 2009, meeting with Rowe, the University of Wisconsin - Stevens Point committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats.

- I. Examiner Order paragraph 1 is affirmed.

J. Examiner Order paragraph 2 is set aside and the following Order is made:

2. The University of Wisconsin - Stevens Point, its officers and agents, shall immediately take the following action which the Wisconsin Employment Relations Commission finds will effectuate the purposes of the State Employment Labor Relations Act:

- a. As to all employees who are represented for purposes of collective bargaining by the Wisconsin Law Enforcement Association, cease and desist from refusing to honor an employee request that a representative of the Wisconsin Law Enforcement Association be present during any mandatory meeting which is held at least in part to investigate the employee's conduct.
- b. Notify employees represented by the Wisconsin Law Enforcement Association by posting in conspicuous places in all University of Wisconsin - Stevens Point facilities where those employees work, copies of the Notice attached hereto as Appendix A. The Notice shall be signed by a representative of the University and shall be posted immediately upon receipt of a copy of this Order and shall remain posted for 30 days. Reasonable steps shall be taken by the University to ensure that said notices are not altered, defaced, or covered by other material.
- c. 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 with it.

Given under our hands and seal at the City of Madison, Wisconsin this 20th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairman James R. Scott did not participate.

**APPENDIX A**

**NOTICE TO UNIVERSITY OF WISCONSIN - STEVENS POINT EMPLOYEES  
REPRESENTED BY THE WISCONSIN LAW ENFORCEMENT ASSOCIATION**

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

WE WILL cease and desist from interfering with employee rights under Sec. 111.82, Stats., by denying employee requests that a representative of the Wisconsin Law Enforcement Association be present during any mandatory meeting which is held, at least in part, to investigate the employee's conduct.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2011.

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For University of Wisconsin - Stevens Point

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

University of Wisconsin – Stevens Point Protective Services

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

As reflected in the preface to our Order, the two questions before us on review are whether Respondent University violated the State Employment Labor Relations Act (SELRA) by: (1) terminating Complainant Starch’s employment at least in part out of hostility toward his lawful concerted activity; and (2) by denying Complainant Starch’s request that a representative of the Complainant Wisconsin Law Enforcement Association (WLEA) be present at the October 20, 2009 meeting which culminated with Respondent University advising Starch that his employment would be terminated effective October 23, 2009.

The Examiner answered the first question in the negative and held his answer to the second question in abeyance pending completion of a grievance arbitration proceeding. As discussed below, we conclude the Examiner correctly answered the first question but erred by failing to answer the second. As to the merits of the second question, we conclude that the Respondent University violated SELRA by denying Complainant Starch’s request that a representative of Complainant WLEA be present at the October 20, 2009 meeting.

**Starch’s Termination**

If the University terminated Starch based in whole or in part out of hostility toward his lawful concerted activity, the University thereby committed unfair labor practices within the meaning of Secs. 111.84(1)(a) and (c) of SELRA. *STATE V. WERC*, 122 WIS. 2D 132, 144 (1985). However, as the Court stated at 142:

A violation of SELRA is not established by merely proving the presence of protected concerted activity. The employee must show that the employer was motivated, at least in part, by anti-union hostility. Therefore, proof that the employee was discharged for legitimate reasons is relevant in determining the employer’s motive.

The Court went on to explain at 143:

As the key element of proof involves the motivation of [the employer] and as, absent an admission, motive cannot be definitively demonstrated given the impossibility of placing oneself inside the mind of the decisionmaker, [the employee] must of necessity rely in part upon the inferences which can reasonably be drawn from facts or testimony. On the other hand, it is worth noting that [the employer] need not demonstrate ‘just cause’ for its action. However, to the extent that [the employer] can establish reasons for its actions which do not relate to hostility towards an employee’s protected concerted activity, it weakens the strength of the inferences which [the employee] asks the [WERC] to draw.

Consistent with the foregoing,

. . . it should be made clear that the mere presence of protected concerted activity does not automatically yield a conclusion that the employer is hostile thereto. While it may be true that if given a choice, employers generally would prefer the absence

of a union or the absence of employees who engage in protected concerted activity, such a generality does not meet Complainant's burden of proof as to Respondent's hostility . . . . In the same vein, it must be noted that participation in protected concerted activity does not immunize an employee for adverse employment consequences if that employee engages in conduct which warrants discipline and if discipline is unrelated to the protected activity.

STATE OF WISCONSIN, DEC. NO. 18397-A (DAVIS, 4/82) AT 9; AFF'D BY OPERATION OF LAW (WERC, 5/82); AFF'D STATE V. WERC, SUPRA.

Applying the foregoing principles to the evidence in this case, we conclude that the University terminated Starch solely based on supervisor Rowe's good faith and unfavorable evaluation of Starch's performance as a police officer. Thus, we generally find the Examiner's extensive analysis of the record to be accurate and have affirmed his dismissal of the Sec. 111.84(1) (a) and (c), Stats. allegations related to Starch's termination.

In doing so, we acknowledge that the parties disagree over the Examiner's assessment in his Finding of Fact 26 regarding how much of Starch's activity was protected by SELRA. We have modified Finding 26 because, in the context of this record, we find it unnecessary to resolve that disagreement. We think it clear that Rowe's decision to terminate Starch was based on his good faith evaluation of Starch's conduct beginning August 31, 2009 and culminating during the weekend of September 19-20, 2009-conduct which does not – and has not been claimed to – fall within the ambit of “lawful concerted” activity.

When doing so, we have also refined Examiner Findings of Fact 20 and 25 to focus the analysis not on whether Rowe's determinations as to Starch's conduct were factually correct but rather on whether Rowe reached those determinations in good faith for reasons unrelated to Starch's lawful concerted activity. As the Court noted above, we are not engaged in a “just cause” analysis, where it would be necessary to conclude whether or not the employer's determinations were factually valid, but rather our focus is to determine what motivated the employer to act. If, as we have concluded here, the employer is acting out of a good faith assessment of the employee's job performance based on information brought to its attention, the “truth” of that assessment is beyond the scope of the fact finding that needs to be done. Thus, we need not and have not determined the “fact” of the matter as to the incidents in question-only that the conclusion Rowe reached based on his understanding of the incidents was reached in “good faith” because it was not influenced by Starch's lawful concerted activity and was grounded in an assessment of Starch's competency to serve as a police officer.<sup>1</sup>

#### **Denial of Starch's Request for WLEA Representation**

As referenced earlier herein, on October 20, 2009, Starch met with Rowe and employer representative Tabor for what the Examiner aptly described as “. . . the culmination of an investigation into recent performance issues and into his performance as a probationary

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<sup>1</sup> Because we are not finding the “truth” as to the incidents that prompted Rowe to terminate Starch, we reject the Complainants' contention that we are relying on hearsay evidence contrary to *GEHNIN V GROUP INSURANCE BOARD*, 278 WIS. 2D 111 (2005). Further, we are in any event satisfied that there is evidence in the record beyond that which Complainants label as “hearsay” to support our “good faith” conclusion.

employee.”

Prior to the meeting, Rowe had denied Starch's request that a WLEA representative be present. During the meeting, Rowe reaffirmed his denial of Starch's request for WLEA representation and advised Starch that he had no such right because he was a probationary employee. During the meeting, Starch was questioned as to various matters related to his job performance. At the conclusion of the meeting, Starch received a letter advising him that his probationary appointment as police officer was terminated effective October 23, 2009.

Before the Examiner, the University argued that: (1) Starch had no right to WLEA representation because he was a probationary employee whose termination therefore was not disciplinary; (2) assuming *arguendo* that he had such a right, the WLEA had contractually waived said right; and (3) in any event it is appropriate to hold this issue in abeyance pending the outcome of a grievance arbitration proceeding that would interpret the contract language upon which the University premised its waiver argument. The Examiner found the third argument persuasive. For reasons discussed below, we do not and thus must confront University arguments (1) and (2) as well.

As to the University's first argument, in STATE OF WISCONSIN (UWM), DEC. NO. 31527-B (WERC, 2/08), we recently stated the following as to the Sec. 111.82, Stats., right of a State employee to engage in "lawful, concerted activities for . . . mutual aid or protection:

As part of their right to engage in concerted activities for mutual aid and protection, employees have the right to the assistance of a union representative in investigatory interviews, when they have a reasonable belief that the interview may lead to discipline. The right is not self-triggering-it arises upon request. Further, the right may be shaped and qualified by the terms of a collective bargaining agreement.

The Commission has previously concluded that because probationary employees have the same statutory right to engage in "mutual aid and protection" as do employees with permanent status, probationary employees possess the same right to union assistance as do permanent employees. CITY OF MILWAUKEE, DEC. NO. 14873-B (WERC, 8/80) AT 36. See also STATE OF WISCONSIN (CANTWELL), DEC. NO. 15716-B (DAVIS, 4/78) AFF'D DEC. NO. 15716-C (WERC, 10/79). Thus, while we acknowledge that Starch's probationary status meant he lacked a constitutional property interest in continued employment and the statutory right to seek civil service review of the University's decision (See BOARD OF REGENTS V. WISCONSIN PERSONNEL COMMISSION, 103 WIS.2D 545 (1981), the lack of such rights does not deprive him of his statutory rights under Sec. 111.82, Stats. In this regard we note that, in the context of this litigation, the University correctly did not dispute Starch's right to be free from adverse action based on hostility toward his lawful concerted activity-which right is derived from the same statutory provision that the University wrongly contends is not applicable as to the issue of representation. Thus, we conclude that Starch had a right to request WLEA representation at the October 20, 2009 meeting based upon Sec. 111.82, Stats.

As to the University's second argument, there are suggestions in prior Commission decisions that a union can contractually waive an individual employee's right to union representation. CITY OF MILWAUKEE, SUPRA; STATE OF WISCONSIN, DEC. NO. 26739-C (WERC, 3/92). Closely examined, however, we think those cases are better characterized as permitting the



so-called “Weingarten” right to be “shaped and qualified by the terms of a collective bargaining agreement” but not necessarily waived entirely. STATE OF WISCONSIN (UWM), SUPRA. However, it is clear that any limitation of individual statutory rights must be clear and unmistakable. CITY OF MILWAUKEE, SUPRA. Reviewing the contract language upon which the University’s waiver argument relies, we conclude that said language fall far short of the clear and unmistakable standard. While the language clearly provides “the retention or release of probationary employees shall not be subject to the grievance procedure,” it does not reference much less clearly provide that probationary employees lack the right to representation in an investigatory interview. Thus, we reject the University’s waiver argument.

As is apparent from our consideration of the waiver issue, we find nothing to be gained from a grievance arbitrator’s interpretation of the contract language in question. The question of “clear and unmistakable waiver” invokes statutory and legal issues beyond those likely to be addressed by an arbitrator and as to which, even if addressed, we would not necessarily defer to an arbitrator’s resolution thereof. Thus, the better approach is to resolve all issues related the representation issue in the context of this proceeding.

Given all of the foregoing, we conclude that the University committed an unfair labor practice within the meaning of Sec. 111.84(1)(a), Stats. by denying Starch’s request for WLEA representation at the October 20, 2009 meeting. As to the question of appropriate remedy for this statutory violation, it is important to note that when union representation is requested, the employer has the option to cancel the meeting and proceed without the benefit of any information that might have been gained during same. CITY OF MILWAUKEE, SUPRA. In that context and this entire record (most particularly the magnitude of the conduct Rowe believed had occurred as well as the evidence regarding the content of the meeting itself), we conclude that it is not appropriate to order Starch reinstated. Rather the purposes of SELRA are best served by ordering the University to cease and desist from such conduct and to post a notice advising employees of the right to representation.

Dated at Madison, Wisconsin, this 20th day of May, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

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Judith Neumann, Commissioner

Susan J. M. Bauman /s/

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Susan J. M. Bauman, Commissioner

Chairman James R. Scott did not participate.