STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION, Complainant,

vs.

MILWAUKEE COUNTY (SHERIFF'S DEPARTMENT), Respondent.

Case 741
No. 70058
MP-4605

Decision No. 33209-A

Appearances:

Attorney Franklyn M. Gimbel and **Attorney Steven C. McGaver**, Gimbel, Reilly, Guerin & Brown, LLP, Two Plaza East, 330 East Kilbourn Avenue, Suite 1170, Milwaukee, Wisconsin, 53202, appearing on behalf of the Milwaukee Deputy Sheriffs' Association.

Attorney Roy L. Williams, Office of Milwaukee County Corporation Counsel, 901 North 9th Street, Milwaukee, Wisconsin, 53233, appearing on behalf of Milwaukee County.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

On August 2, 2010, the Milwaukee Deputy Sheriffs' Association (hereafter "Association") filed a complaint with the Wisconsin Employment Relations Commission, asserting that Milwaukee County (hereafter "County") had committed prohibited practices in violation of Sections 111.70(3)(a)1, (3)(a)2, and (3)(a)3 of the Wisconsin Municipal Employment Relations Act. The Commission appointed Danielle L. Carne to act as Examiner, to make and issue findings of fact and conclusions of law and to issue appropriate orders. On February 23, 2011, the County answered the complaint, denying any alleged violation and pleading certain affirmative defenses[1]. A hearing on the matters at issue was held in Milwaukee, Wisconsin, on May 18, 2011. Thereafter, the Association and County each filed initial post-hearing briefs. The Association subsequently filed a post-hearing reply brief, the County declined the opportunity to do so, and the record was closed on August 15, 2011.

[1] The County did not pursue these affirmative defenses in this case beyond pleading them in its answer to the complaint. They are not supported by the record and have been rejected.

On the basis of the record evidence and the arguments of the parties, the Examiner makes and issues the following

FINDINGS OF FACT

1. The Association is a labor organization that is certified as the exclusive collective bargaining representative for all law enforcement employees of the Milwaukee County Sheriffs' Department ("Department") holding the rank of Deputy Sheriff and Deputy Sheriff Sergeant, all of whom are municipal employees.

2. The County is the municipal employer of the law enforcement employees represented by the Association.

3. The most recent collective bargaining agreement ("Agreement") between the Association and the County expired in 2008. At all relevant times, negotiations for a successor collective bargaining agreement were ongoing.

4. The Agreement contains a provision that requires scheduled overtime to be assigned as follows: overtime hours are first to be distributed, in order of seniority, to deputies in the Department who volunteer for the hours; in the event that there are insufficient volunteers to fill the overtime hours, the hours can be filled through mandatory assignment, in the order of reverse seniority; if the need for overtime arises from an event that is not specific to a division within the Department, the hours are to be assigned on a Department-wide basis.

5. At all relevant times, David A. Clarke, Jr. was the elected Sheriff of Milwaukee County. He became the County Sheriff in 2002.

6. In August of 2008, Sheriff Clarke issued to all members of the Department Directive 18-08, which states as follows:

> Effective immediately, in any instance in which a supervisory member holding the rank of Sergeant or above is questioned by a trustee, executive board officer, legal counsel, or business agent of the Milwaukee Deputy Sheriff's Association over a matter that seeks to clarify, interpret, or otherwise negotiate the resolution of an issue of policy, the implementation of a new protocol, or an issue arising from the collective bargaining agreement, the MDSA official is to be directed to contact their legal counsel, or Inspector Kevin A. Carr.
>
> The uniform application of this directive will ensure that labor/management issues grounded in policy and the collective bargaining agreement are handled in a uniform, consistent manner, based on up-to-date knowledge of the intricacies of such issues.

> Additionally, appropriate disciplinary action may be taken against employees who violate this directive.
>
> Nothing in this directive is meant to imply that supervisory members can not actively engage in leadership in addressing the operational needs of the workforce, or discussing issues with line staff.

7. On June 24, 2010, a concrete panel fell from a parking structure located in a Milwaukee County recreational area called O'Donnell Park. The fallen panel injured two people and killed one fifteen-year-old boy.

8. The collapse at O'Donnell Park resulted in the unanticipated, immediate need for a substantial number of law enforcement personnel to secure the crime scene and prevent the public from entering the parking structure. O'Donnell Park is under the jurisdiction of the County Sheriff's Department, and the Department participated in the management of the emergency event there.

9. At all relevant times, Kevin Carr was employed in the Department in the rank of Inspector and Thomas Meverden was employed in the Department in the rank of Captain. Responsibility for staffing the O'Donnell Park site was assigned to Carr. The staffing work ultimately fell to Meverden, who oversaw the Patrol Division at the County's central, downtown jail. Meverden directed one of his third shift sergeants in the Patrol Division to order Detention Bureau personnel from the jail to the O'Donnell Park site after completing their shifts, to work overtime there.

10. At all relevant times, Richard Graber was employed by the Department in the rank of Deputy Sheriff Sergeant. Graber is assigned to the Detention Bureau and works on the first shift in booking at the downtown jail. Since 2007, Graber also has served as the vice president of the Association's executive board. In that role, Graber represents Association members in internal affairs interviews, in grievances, and in collective bargaining, among other things.

11. On the morning of June 25, 2010, Graber arrived at the jail for his regular shift. During the course of that morning, Graber heard from another deputy that only jail personnel were being assigned to work overtime at the O'Donnell Park scene. Graber also learned that some deputies were working their regularly scheduled, eight-hour jail shifts, then immediately being sent to work an eight-hour overtime shift at O'Donnell Park, and then having only four or five hours to rest before having to return for another jail shift.

12. Understanding that the Patrol Division of the Detention Bureau had been tasked with assigning jail deputies to O'Donnell Park, Graber called the Patrol Division to confirm that only deputies from the jail were being used to cover the overtime hours. At all relevant

times, Carol Mascari was employed in the Department in the rank of Deputy Sergeant and was assigned to the Patrol Division. Graber reached Mascari on the telephone and conveyed to her his understanding that, pursuant to the terms of the overtime provision in the Agreement, the overtime hours were to be distributed among all the deputies in the Department, rather than only among jail deputies.

13. On the morning of June 25, Meverden was in the area where Mascari was having her phone conversation with Graber. Mascari waved Meverden over during the phone call and informed Meverden that Graber had questions about the way the O'Donnell Park situation was being staffed. At that point, Meverden got on the phone with Graber to discuss that issue.

14. During their first phone conversation, Meverden explained to Graber that the situation at O'Donnell Park presented an exigency that had created a need to staff the scene very quickly with the human resources that were available. Meverden also explained to Graber that the availability of Department personnel had been limited by the fact that two additional events, Summerfest and Big Bang Fireworks, were happening at the same time. Many of the Department's deputies already had been assigned to work those events. Graber responded to Meverden that he understood the issues Meverden was raising but that he did not think the exigency extended that far and he did not think it was fair that only jail deputies were being ordered to work the O'Donnell Park overtime hours. Meverden told Graber that he had charged Sergeant Mascari that morning with the task of putting out requests for volunteers for overtime at O'Donnell Park. This phone call with Meverden lasted a couple minutes.

15. Meverden perceived this phone call with Graber to be heated at times, but he did not perceive Graber to have acted in any disrespectful or unprofessional manner.

16. A short time after their initial telephone conversation, Meverden placed a telephone call to Graber. Meverden's purpose for this call was to ask Graber if the overtime requirements set forth in the Agreement could be waived, so that Meverden could continue to assign only jail deputies to O'Donnell Park. Graber refused to waive the requirements.

17. At all relevant times, Kevin Nyklewicz was employed by the Department in the rank of Deputy Inspector and was assigned to the downtown jail. Nyklewicz had no direct role in assigning personnel to the O'Donnell Park situation. In the late morning of June 25, after he had spoken to Mascari and Meverden, Graber spoke with Nyklewicz regarding the O'Donnell Park staffing issue. Again in this conversation Graber expressed frustration and disagreement with the use of only jail deputies to fill the overtime hours. Graber told Nyklewicz that deputies were working double shifts and getting burned out. Graber told Nyklewicz that he thought Sheriff Clarke was "screwing" with the deputies at the downtown jail and that he thought that was "ridiculous". Nyklewicz told Graber the subject was not up for discussion and ended the conversation.

18. Nyklewicz believed Graber was being insubordinate in this conversation by challenging the authority and decision-making of the Sheriff. As a result of the conversation, Nyklewicz intended to write Graber up for insubordination, but he never did so.

19. At all relevant times, Edward Bailey was employed in the Department in the rank of Deputy Inspector. Shortly after it occurred, Nyklewicz spoke with Bailey regarding his conversation with Graber, and Bailey told Nyklewicz not to take any disciplinary action and that he would be speak to Graber.

20. Around 12:30 p.m. on June 25, Graber received a call from Bailey in which Bailey told Graber that they needed to have a "chat" and that Graber should report to the Criminal Investigation Division conference room in the Department's safety building. Graber was waiting outside the conference room when Bailey arrived, accompanied by the Sheriff, at 1:00 p.m. Before entering the conference room, Bailey asked Graber if he was wearing any recording devices, to which Graber responded that he was not. Bailey looked Graber over quickly and told him to enter the room.

21. The following statements were made at the meeting attended by Sheriff Clarke, Bailey, and Graber:

-Sheriff Clarke began the meeting by asking Graber who runs the Department. Graber responded that the Sheriff runs the Department. The Sheriff told Graber that he does not "give a fuck" about what Graber thinks – that he, the Sheriff, has a job to do and he'll do it that way he feels like doing it.

-Sheriff Clarke indicated that he had been told that Graber was getting in the way of the efforts to handle the O'Donnell Park situation. Sheriff Clarke told Graber that when a superior officer requests resources, Graber is not to question the officer – he is to give him what he wants. Graber stated to Sheriff Clarke that he had not been asked and had not refused to provide any resources.

-Sheriff Clarke stated that Graber is a deputy in the Department, and as such his responsibility is to follow the rules and policies of the Department and to carry out the directives that come down from superior officers.

-Sheriff Clarke stated that it is his responsibility to do everything he can to address emergency situations that arise. If any other issue comes into play, it is not to get in the way of handling the emergency. Those other issues can be taken up through the processes that are set forth in the Agreement. Any problem with the Agreement is not to get in the way of handling an emergency.

-Sheriff Clarke told Graber several times that he was not in the meeting to discuss the Agreement between the County and the Association. He stated that the conversation was not about the Agreement.

-Sheriff Clarke asked Graber about the conversation Graber had that morning with Meverden. Graber confirmed that he had such a conversation and told Sheriff Clarke that Meverden had asked Graber to waive the overtime provisions in the Agreement but that he, Graber, had refused to do so. Sheriff Clarke responded, “I don’t give a fuck about your contract. I have a job to do, and I have a dead child at the lakefront and you’re complaining about overtime”.

-Sheriff Clarke stated that Graber did not care about the dead child, and Graber responded that he did care. Sheriff Clarke called Graber a “sick fuck” and, at that point, rose up out of his chair.

-Sheriff Clarke told Graber that he is not to call anyone from the Department other than Carr regarding issues related to the Agreement and that he, Sheriff Clarke, has made it perfectly clear that if Graber was to contact the media or anyone other than Carr in the future, Sheriff Clarke would come after Graber.

-Graber stated to Sheriff Clarke, “you don’t know me”, to which Sheriff Clarke responded, “I don’t want to know you, you’re an organizational terrorist – you’re a cancer of the agency”.

-Sheriff Clarke told Graber that he is a terrible supervisor. Graber stated that he is not a terrible supervisor – that he works hard to get done what needs to be done. Graber told Sheriff Clarke to ask his supervisor about that. Sheriff Clarke responded, “I don’t have to ask your supervisor – if I have to ask them, I’m not doing my job. I know you, your kind. I want to get rid of a voice like you”.

-Sheriff Clarke stated to Graber, “You just don’t get it. I’m winning, you’re losing. You guys just don’t get it”.

-Sheriff Clarke stated that he had heard Graber’s name come up too many times lately and that he was sick of hearing Graber’s name and that it’s always negative.[2]

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[2] Under Sheriff Clarke, Graber has received five disciplinary suspensions. At the time of hearing, three of those suspensions had been overturned. A March of 2007, five-day suspension was vacated in MILWAUKEE COUNTY, MA-13662 13662 (Michelstetter, 1/08); a mid- to late-2008, one-day suspension was vacated in MILWAUKEE COUNTY, MA-14183 (O’Callaghan, 6/09); and a July of 2009, two-day suspension was vacated in MILWAUKEE COUNTY, MA-14514 (Emery, 3/10). At the time of hearing, the fourth and fifth disciplinary suspensions that had been imposed against Graber were being challenged by the Association in arbitration. The undersigned takes judicial notice that one of the two outstanding suspensions, a late-2010, seven-day suspension, was vacated in MILWAUKEE COUNTY, MA-14954 (Carne, 9/11). The status of the fifth is unknown.

-Sheriff Clarke had a piece of paper in front of him that had been written by Nyklewicz regarding the conversation from earlier that day between Graber and Nyklewicz. Apparently referring back to the part of the conversation between Graber and Nyklewicz in which they discussed the potential for grievances related to the O'Donnell Park overtime issue, Sheriff Clarke stated to Graber, "I don't give a fuck what you file.

22. The meeting between Sheriff Clarke, Bailey, and Graber lasted approximately two hours.

23. Graber never was told before, during, or after the meeting that he was not to file grievances related to the O'Donnell Park overtime situation.

24. After June 25, 2010, Graber never was disciplined for any of his actions on June 25, 2010.

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

CONCLUSIONS OF LAW

1. The County is a municipal employer within the meaning of Section 111.70(1)(j), Wis. Stats.

2. The Association is a labor organization within the meaning of Section 111.70(1)(h), Wis. Stats.

3. Sheriff Clarke and Bailey were at all relevant times acting on behalf of the County within the scope of their authority, within the meaning of Section 111.70(1)(j), Wis. Stats.

4. Graber was engaged in lawful concerted activity for the purpose of collective bargaining or other mutual aid and protection, within the meaning of Section 111.70(2), Wis. Stats., when he engaged in the conduct described herein at Findings of Fact 11 through 17.

5. Sheriff Clarke and Bailey were aware of Graber's activity that is described herein at Findings of Fact 11 through 17.

6. Sheriff Clarke bore animus toward Graber's activity that is described herein at Findings of Fact 11 through 17.

7. The interaction between Sheriff Clarke, Bailey, and Graber described herein at Findings of Fact 20, 21, and 22 was motivated, at least in part, by animus toward Graber's activity that is described herein at Findings of Fact 11 through 17.

8. The County discriminated against Graber in violation of Section 111.70(3)(a)3, Wis. Stats., and derivatively Section 111.70(3)(a)1, Wis. Stats.

9. The interaction between Sheriff Clarke, Bailey, and Graber that is described herein at Findings of Fact 20, 21, and 22, interfered with, restrained, and/or coerced Graber in the exercise of his right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection and, in doing so, constituted a prohibited practice in violation of Section 111.70(3)(a)1, Wis. Stats.

10. The County's interference with, restraint, and/or coercion of Graber's right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, as described herein at Findings of Fact 20, 21, and 22, was only justified in part by the County's legitimate operational needs.

11. The County's conduct as described herein at Findings of Fact 20, 21, and 22 did not initiate, create, dominate or interfere with the formation or administration of the Association and, therefore, did not constitute a prohibited practice within the meaning of Section 111.70(3)(a)2, Wis. Stats.

12. The positions adopted by the County in this matter were not frivolous or taken in bad faith.

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

ORDER

It is hereby ORDERED that

1. The portion of the Association's Complaint against the County alleging prohibited practices in violation of Section 111.70(3)(a)2, Wis. Stats., is dismissed.

2. Milwaukee County shall cease and desist from interfering with, restraining, and/or coercing Graber or any employee represented by the Association in the exercise of their rights guaranteed in Section 111.70(2), Wis. Stats.

3. Milwaukee County shall cease and desist from discriminating against Graber or any of its employees for engaging in lawful concerted activity.

4. Milwaukee County shall take the following affirmative actions, which the Examiner finds will effectuate the purposes of the Municipal Employment Relations Act:

a. Notify bargaining unit employees by posting in conspicuous places where employees are employed by the Milwaukee County Sheriff's

Department, copies of the notice attached hereto and marked as "Appendix A". The notice shall be signed by the Milwaukee County Sheriff and shall remain posted for thirty (30) days thereafter. Milwaukee County shall take reasonable steps that said notices are not altered, defaced, or covered by other material;

b. 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.

5. The Association's request for an order that the County pay the Association's attorney fees and other costs incurred in this matter is denied.

Dated at Madison, Wisconsin, this 11th day of October, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

APPENDIX "A"

NOTICE TO ALL EMPLOYEES REPRESENTED FOR PURPOSES OF COLLECTIVE BARGAINING BY THE 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:

> WE WILL NOT interfere with, restrain or coerce Richard Graber or any other employee represented by the Milwaukee County Deputy Sheriffs' Association in the exercise of the right to form or join a union and/or seek to bargain collectively with the County, or any other rights guaranteed by the Municipal Employment Relations Act.
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> WE WILL NOT discriminate against Richard Graber or any other employee represented by the Milwaukee County Deputy Sheriffs' Association in the exercise of the right to form or join a union and/or seek to bargain collectively with the County, or any other rights guaranteed by the Municipal Employment Relations Act.

Dated this ________ day of ________________, 2011.

MILWAUKEE COUNTY

By ______________________________________
Sheriff David A. Clarke, Jr.

THIS NOTICE WILL BE POSTED IN THE LOCATIONS CUSTOMARILY USED FOR POSTING NOTICES TO EMPLOYEES REPRESENTED BY THE MILWAUKEE DEPUTY SHERIFFS' ASSOCIATION FOR A PERIOD OF THIRTY (30) DAYS FROM THE DATE HEREOF. THIS NOTICE IS NOT TO BE ALTERED, DEFACED, COVERED, OR OBSCURED IN ANY WAY.

MILWAUKEE COUNTY

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The question presented by this case is whether the County's conduct violated Section 111.70(3)(a)1, Wis. Stats., by interfering with Graber's exercise of the rights guaranteed under that statute, violated Section 111.70(3)(a)2, Wis. Stats., by interfering with the administration of the Association, or violated Section 111.70(3)(a)3, Wis. Stats., by discriminating against Graber because of his union activity. To support any one of these claims, the Association must prove by clear and satisfactory preponderance of the evidence that the alleged violation occurred. Section 111.70(4)(a), Wis. Stats.; LAYTON SCHOOL OF ART AND DESIGN V. WERC, 82 WIS. 2D 324 (1978).

Section 111.70(3)(a)1, Wis. Stats.

Section 111.70(3)(a)1, Wis. Stats., makes it a prohibited practice for a municipal employer "[t]o interfere with, restrain or coerce municipal employees in the exercise of their rights guaranteed in sub. (2)". The rights identified under Section 111.70(2), Wis. Stats., include, among others, "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 …."

Violations of Section 111.70(3)(a)1, Wis. Stats., occur when employer conduct would have a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Section 111.70(2) rights. RACINE EDUCATION ASSOCIATION, DEC. NO. 29074-C (WERC, 7/98); WERC V. EVANSVILLE, 69 WIS. 2D 140 (1975). This standard is objective. EDGERTON FIRE PROTECTION DISTRICT, DEC. NO. 30686-B (WERC, 2/05). In other words, a violation may be found where the employer did not intend to interfere and an employee did not feel coerced or was not, in fact, deterred from exercising Sec. 111.70(2) rights, and a finding of anti-union animus or motivation is not necessary. RACINE EDUCATION ASSOCIATION, *supra*; JEFFERSON COUNTY, DEC. NO. 26845-B (WERC, 7/92), *aff'd* 187 WIS. 2D 647 (CT. APP. 1994); BEAVER DAM UNIFIED SCHOOL DISTRICT, DEC. NO. 20283-B (WERC, 5/84); CITY OF BROOKFIELD, DEC. NO. 20691-A (WERC, 2/84); JUNEAU COUNTY, DEC. NO. 12593-B (WERC, 1/77).

The Commission has recognized that an employer's legitimate business interests can sometimes justify conduct that may have a limiting effect on protected activity. Employer conduct which may well have a reasonable tendency to interfere with employee exercise of protected rights generally will not be found to violate Section 111.70(3)(a)1, Wis. Stats., if the employer had a valid business reason for its actions. RACINE EDUCATION ASSOCIATION, *supra*; BROWN COUNTY, DEC. NO. 28158-F (WERC, 12/96); MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 27867-B (WERC, 5/95); CEDAR GROVE-BELGIUM SCHOOL DISTRICT,

DEC. NO. 25849-B (WERC, 5/91); CITY OF BROOKFIELD, *supra*; KENOSHA BOARD OF EDUCATION, DEC. NO. 6986-C (WERC, 2/66). Thus, the analysis as to whether a violation of Section 111.70(3)(a)1, Wis. Stats., has occurred requires a balancing of the intrusion on employee rights against the employer's legitimate operational needs. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, ET AL., DEC. NO 30340-B (WERC, 7/04). This test permits an employer to interfere with its employees' lawful concerted activity to the extent justified by the employer's operational needs. ID.

There is no question here that, on the morning of June 25, 2010, Graber was engaged in the kind of activity protected by Section 111.70(2), Wis. Stats. It is well-established that, as a general rule, individual activity involving attempts to enforce the provisions of a collective bargaining agreement constitutes concerted activity. CITY OF MILWAUKEE, DEC. NO. 29270-B (WERC, 12/98). Efforts to do so have been characterized as "but an extension of the concerted activity giving rise to that agreement". BUNNEY BROS. CONSTR. CO., 139 NLRB 1516 (1962). The record indicates that each of the conversations Graber had on the morning of June 25 were specifically about Graber's belief that the O'Donnell Park situation was being staffed in a manner that violated the Agreement between the Association and the County and, in doing so, affected the conditions of employment for jail deputies employed by the County.

Moreover, there is little doubt regarding interference. As discussed below, an analysis of the Sheriff's comments, and a consideration of the context in which they were made, leads to the conclusion that they would have a reasonable tendency to interfere with, restrain, or coerce an employee's exercise of protected rights. Indeed, although evidence of actual interference, restraint, or coercion is not necessary under the standard established by the Commission, it is available here. The meeting in the middle of the day on June 25 certainly precluded Graber, at least for two hours, from engaging in any further concerted activity. Further, Graber credibly testified at hearing that he felt intimidated by the conversation with the Sheriff, a reaction other, reasonable employees likely would have had too.

The County argues that it had good reason to interfere with Graber's concerted activity. It contends that, by having conversations with Mascari, Meverden, and Nyklewicz about the overtime issue, Graber was interfering with the general efforts in the Department to handle the O'Donnell Park situation, and this constituted insubordination.[3] Also, Nyklewicz testified at hearing that he believed that Graber, by criticizing the staffing decision, was "bad mouthing" the Sheriff. Nyklewicz perceived Graber's comments as being a challenge to the Sheriff's authority and decision-making, and therefore as insubordinate. Additionally, the County has asserted that Graber was insubordinate by taking his overtime concerns to Mascari, Meverden, and Nyklewicz in violation of Directive 18-08, which required him to raise concerns about the Agreement with Carr.

These are legitimate business concerns. The County's need to counsel Graber not to interfere with operations, but rather to follow the "obey now, grieve later" principle was

[3] Although Sheriff Clarke's comments to Graber on June 25 seemed to suggest otherwise, Graber had not received and therefore had not failed to execute any direct order related to the staffing of O'Donnell Park.

legitimate. It also seems to have been legitimate for the County to remind Graber that he was to take his contract-related concerns to Carr.[4] It is less clear that Nyklewicz was fair in his perception of Graber's comments as insubordinately challenging the decision-making authority of the Sheriff. Given that the subject of those comments was Graber's criticism of a perceived violation of the Agreement, they necessarily would have come across as such a challenge, but would not have constituted insubordination for that reason alone. Still, it was fair for Nyklewicz to expect such criticisms of an order by the Sheriff to be raised in a respectful manner that was consistent with the chain of command in the Department.

The County also contends that the events of June 25 were justified by the emergency circumstances under which the Department was operating. The County would argue that Graber's activities were unusually disruptive and needed to be addressed more aggressively given the Department's pressing need to handle that crisis, as well as Summerfest and Big Bang Fireworks. While recognizing the increased demand placed on the Department by the simultaneous occurrence of these events, there are several indications on the record that the level of exigency was not at the height the County has asserted. Among Mascari, Meverden, and Nyklewicz, none of them told Graber on June 25 that they were so busy that his activities were getting in the way. Meverden in fact discussed the overtime issue with Graber twice, and the second discussion was at Meverden's initiative. Further, even though the collapse had occurred only the day before, Meverden had instructed Mascari on the morning of June 25 to begin seeking volunteers to fill the overtime hours, which suggests at least the beginning of a return to normalcy already was happening in the Department. Additionally, while Department resources must have been strained, the fact that the Sheriff and one of his top commanders were able to devote two hours in the middle of the day to dealing with Graber's personnel issues suggests that the O'Donnell Park situation did not have the Department in a total state of emergency that required all hands on deck. Thus, while there is something to the County's claim that exigent circumstances legitimized its handling of Graber, that point should not be given more weight than it deserves.

The problem with the discussion between Sheriff Clarke and Graber[5] is not that it lacked a legitimate basis, but that it went too far. The Commission has established that an inherent aspect of the 111.70(3)(a)1 test, in which the employer's operational needs are balanced against employee rights, is that the employer's intrusion may not exceed the bounds of its legitimate interests. STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS, ET AL., DEC. NO. 30340-B (WERC, 7/04). In my view the intrusion that flowed from the Sheriff's comments went beyond the County's legitimate interests. The excessiveness in what Clarke said is not so much with the language or even necessarily with the tone he used – disagreements regarding

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[4] The Association has argued that this requirement constitutes a separate prohibited practice and, therefore, could not have formed a legitimate basis for the meeting. This position, however, has not been sufficiently developed in this case to support the conclusion that the County did not have a legitimate interest in this area.

[5] Finding of Fact 21 regarding the content of the conversation is based on a careful parsing of the testimony. In describing the conversation, under both direct- and cross-examination, Graber was forthcoming and thorough. The testimony of Graber reflected in Finding of Fact 21 was unrebutted, in some instances affirmatively confirmed by Sheriff Clarke's testimony, and accepted as accurate.

labor matters are often heated and often involve the use of strong language, EDGERTON FIRE PROTECTION DISTRICT, *supra*. Rather, it is with the ideas he expressed.

It is critical to recognize that the Sheriff's comments to Graber were made in the context of a conversation that had been prompted by and was specifically about Graber's effort to have the Agreement enforced. Although Clarke stated several times during the conversation that he was not going to discuss the Agreement, and he claimed at hearing in this matter that the conversation was not about Graber's effort to have the overtime provision enforced but rather was about the fact that Graber was "getting in the way", it is clear from the timing and the content of the conversation that a dispute about whether the Agreement needed to be followed that day was a significant part of the conversation. Within that context, Sheriff Clarke took serious blows at Graber's performance as an employee and his role in the Department. In doing so, the Sheriff created an inextricable link between his unfavorable views toward the union activity in which Graber had been engaged that morning and his negative assessment of Graber as an employee. Sheriff Clarke criticized Graber as a "terrible supervisor", an "organizational terrorist", and a "cancer" in the Department. Clarke identified Graber as a target in the workplace: a "losing" entity and voice to "get rid of". Clarke framed Graber's concerns about the Agreement as being antithetical to the Department's obligation to respond to the emergency and O'Donnell Park, as well as contrary to any professionally and morally appropriate concern for the child injured in the accident. This appears to have been the conclusion that led Sheriff Clarke to characterize Graber as a "sick fuck".

Even accounting for the need to reprimand Graber for certain perceived acts of insubordination, and even accepting the County's contention that such a need was heightened by the exigency associated with everything that was going on in the Department on June 25, 2010, these comments by the Sheriff's had a tendency to interfere to a degree that exceeded the County's operational needs and, in doing so, violated the law.

Section 111.70(3)(a)2, Wis. Stats.

Section 111.70(3)(a)2 makes it a prohibited practice for a municipal employer "[t]o initiate, create, dominate or interfere with the formation or administration of any labor organization or contribute financial support to it . . ." The section assumes interference of a magnitude that threatens the independence of a labor organization as the representative of employee interests. COLUMBIA COUNTY, DEC. NO. 22683-B (WERC, 1/87). Examples of interference within the proscription of Section 111.70(3)(a)2, Wis. Stats., would be negotiating with one of the rival unions during the pendency of an election petition, DANE COUNTY, DEC. NO. 5915-B (WERC, 10/73), selecting the individuals to serve on a committee dealing with working conditions, or having a supervisor serve in a significant union position, PROFESSIONAL POLICEMEN'S PROTECTIVE ASSOCIATION OF MILWAUKEE, DEC. NO. 12448-A (WERC, 10/74). Here, the Association has offered no arguments in its brief supporting this type of charge. Moreover, there is no evidence on the record suggesting conduct of a magnitude that would support such a claim.

Section 111.70(3)(a)3, Wis. Stats.

Sec. 111.70(3)(a)3, Stats., makes it a prohibited practice for a municipal employer "[t]o encourage or discourage a membership in any labor organization by discrimination in regard to hiring, tenure, or other terms or conditions of employment. . ." Proof of a violation of Sec. 111.70(3)(a)3, Stats., requires that four elements be established by a clear and satisfactory preponderance of the evidence: (a) that the employee has engaged in lawful concerted activity (or was believed to have so engaged); (b) that the employer was aware of (or believed it was aware of) such activity at the time of the adverse action; (c) that the employer bore animus toward the activity; and (d) 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. WISCONSIN RAPIDS SCHOOL DISTRICT, DEC. NO. 30965-B (WERC, 1/09); MUSKEGO-NORWAY SCHOOL DISTRICT V. WERB, 35 WIS. 2D 540 (1967); EMPLOYMENT RELATIONS DEP'T V. WERC, 122 WIS. 2D 132 (1985).

As discussed, Graber clearly was engaged in lawful concerted activity on June 25. Further, there is no doubt that Sheriff Clarke and Bailey were aware of Graber's activity at the time the meeting occurred. Graber's complaints about the perceived violation of the Agreement had been the only subject of the only conversations that could possibly have prompted the meeting that day. As for the third prong of the discrimination test, one barely needs to infer animus from Sheriff Clarke's comments towards Graber's activities. The general theme of Clarke's comments was a general hostility toward Graber's union activity. Finally, although the meeting with Graber seems to have been motivated, in part, by Clarke's desire to reprimand Graber regarding certain matters, there is no question given the substance of Clarke's comments that it also was motivated by his apparent hostility. Given these factors, the Association also has met its burden to establish the alleged violation of Section 111.70(3)(a)3, Wis. Stats.

Attorney Fees

The Association has requested that the County be required to reimburse the Association for reasonable attorney fees and costs incurred in the course of this proceeding. It is well-established in the Commission's caselaw that such fees are extraordinary remedy that is granted only in exceptional cases. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03); WISCONSIN DELLS SCHOOL DISTRICT, DEC. NO. 25997-C (WERC, 8/90). Only where a party's position is found to have been frivolous or taken in bad faith is such a remedy appropriate. CITY OF WHITEWATER, DEC. NO. 28972-B (WERC, 4/98); HAYWARD COMMUNITY SCHOOL DISTRICT, DEC. NO. 24259-B (WERC, 3/88). Here, as established, there were some legitimate

business reasons for the exchange that occurred between Sheriff Clarke and Graber. Thus, although I have concluded that the County's conduct was unlawful, I do not deem the County's position in this case to have been frivolous or taken in bad faith.

Dated at Madison, Wisconsin, this 11th day of October, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

DLC/gjc
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