STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JOHN JANIK, JERMEKA GRIFFIN and BARBARA DUNCAN, Complainants,

vs.

MILWAUKEE COUNTY, Respondent.

Case 788 No. 71642 MP-4717 (John Janik)
Case 789 No. 71643 MP-4718 (Jermeka Griffin)
Case 790 No. 71644 MP-4719 (Barbara Duncan)

DECISION NO. 33952-A

Appearances:

Teresa Mambu-Rasch, Attorney, Sweet and Associates, 2510 East Capitol Drive, Milwaukee, Wisconsin 53211, appearing on behalf of all three Complainants.

Daniel Vliet, Attorney, Buelow Vetter Buikema Olson & Vliet, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin 53186**,** appearing on behalf of the Respondent County.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On June 13, 2012, three prohibited practice complaints were filed with the Wisconsin Employment Relations Commission against Milwaukee County (hereinafter the County or Employer). The Complainant in the first case is John Janik, and the WERC case numbers assigned to that case are Case 788 No. 71642 MP-4717. The Complainant in the second case is Jermeka Griffin, and the WERC case numbers assigned to that case are Case 789 No. 71643 MP-4718. The Complainant in the third case is Barbara Duncan, and the WERC case numbers assigned to that case are Case 790 No. 71644 MP-4719. All three complaints alleged that the County violated Section 111.70(3)(a)1 of the Municipal Employment Relations Act when it disciplined the three named Complainants. The complaints further alleged that all three named Complainants were disciplined for rendering mutual aid and / or protection to a coworker. After the complaints were filed, they were initially held in abeyance at the parties' request. On October 3, 2012, the Commission appointed Raleigh Jones, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order, as provided for in Sections 111.07(5) and 111.70(4)(a), Stats. On November 12, 2012, the County filed an answer to all three complaints denying the allegations. The three complaints were consolidated for the purpose of hearing and decision. Hearing on the three complaints was initially scheduled for November 27, 2012, but

that hearing was cancelled. Thereafter, the hearing was scheduled and cancelled two more times. The hearing was held on October 9, 2013, in Milwaukee, Wisconsin. The parties then filed briefs by December 20, 2013. The record was closed on December 27, 2013, when the Examiner was notified that neither side was filing a reply brief. Based on 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. The three Complainants herein – John Janik, Jermeka Griffin and Barbara Duncan – all work for Milwaukee County. Janik was hired on May 12, 2008, Griffin was hired on January 8, 2007, and Duncan was hired on July 14, 2003. All three Complainants are Correctional Officers, hereinafter identified as COs. They are now considered "general municipal employees" within the meaning of Section 111.70(1)(fm), Stats.

2. At all relevant times, all three Complainants were assigned to work at the correctional facility formerly known as the Milwaukee County House of Correction.

3. Until December 31, 2008, the House of Correction was operated and managed by a Superintendent who was appointed and confirmed by the Milwaukee County Executive and Board of Supervisors.

4. Shortly before January 1, 2009, the Milwaukee County Executive and Board of Supervisors appointed and confirmed the Milwaukee County Sheriff's Office to operate and manage the House of Correction.

5. On January 1, 2009 and at all relevant times, the Sheriff's Office operated the House of Correction and renamed it the County Correctional Facility – South (CCF-S).

6. Among other duties and responsibilities, Correctional Officers (COs) and supervisors are tasked with drafting reports pertaining to incidents that occur at the CCF-S. Prior to the Sheriff's Office assumption of the management of the CCF-S, reports were generated by hand on forms known as "92's." Shortly after taking control of the CCF-S, the Sheriff's Office instituted the Report Management System (RMS). RMS is an electronic log system for appropriate staff to enter incident reports. Since the institution of RMS, incident reports are typed into the RMS. Supervisors have the ability to lock or restrict access to RMS reports that they write so that COs cannot open or read them. There are no rules regarding COs reading RMS reports that are accessible to them.

7. On April 6, 2011 (Note: All dates hereinafter refer to 2011), an inmate at the CCF-S told Lt. John Berg that a correctional officer, who he named, was passing marijuana to inmates in his unit. The inmate identified the correctional officer in question as Margaret Taylor-Cobbs. Berg told his supervisor the foregoing who, in turn, passed the information onto other supervisors.

8. Detective Tim Lorch of the Sheriff's Office Criminal Investigation Division was assigned to investigate the allegation referenced in Finding No. 7 as an active criminal investigation. On April 7, Lorch interviewed the inmate who made the allegation against Taylor-Cobbs referenced in Finding No. 7. Afterwards, Lorch created an initial report which was denominated as Report No. 11-002509. That report simply summarized the allegations involved and his assignment to the investigation. Detective Lorch typed this report on the RMS referenced in Finding No. 6 and saved it. While Lorch thought that he saved the report in a secure manner on the RMS so that it could only be accessed by command staff and other authorized users, that was not the case, and the report was instead unintentionally accessible to any RMS user. Lorch then went on vacation the next day (April 8), and was on vacation for ten days. Before he left on vacation though, he arranged for staff to conduct a "shakedown," or intensive search, of the inmate dorm in question on Sunday, April 10.

9. On Friday, April 8, CO Janik was assigned to work in the N-6 dorm, a housing unit for inmates. About 11:15 p.m. Janik was reading RMS reports on a computer. In doing so, he came across RMS Report No. 11-002509, which was the report referenced in Finding No. 8. That report was not locked. Janik accessed and read the report. When he did, he learned that an inmate had alleged that CO Taylor-Cobbs was bringing marijuana to inmates. Janik knew CO Taylor-Cobbs, as the two had started employment at the same time and attended the Training Academy together.

10. After reading the report referenced above, Janik called CO Taylor-Cobbs and told her that she was the subject of an ongoing (criminal) investigation because she was accused of providing marijuana to inmates. Taylor-Cobbs, who was working at the CCF-S at the time, then went to Janik's work location. After she (Taylor-Cobbs) arrived there, Janik showed her the report referenced in Finding No. 8 on his computer and she read it. Afterwards, Taylor-Cobbs told Janik not to say anything, and she would take care of it. Taylor-Cobbs then left Janik's work station. Later, she called Janik and asked him for the report number, and Janik gave it to her.

11. On Sunday, April 10, COs Griffin and Duncan reported to work on first shift. Griffin was assigned to the E-6 Dorm, a dormitory of inmates. During her shift, Griffin was reviewing and reading various RMS reports. In doing so, she came across RMS Report No. 11-002509 (i.e. the report referenced in Finding No. 8). That report was still not locked. She read it. In doing so, she learned that an inmate had alleged that CO Taylor-Cobbs was bringing marijuana to other inmates. Griffin knew Taylor-Cobbs, as she was a coworker. After Griffin read the report, she called Duncan. Griffin knew that Duncan was a long-time friend of Taylor-Cobbs (aside from being a coworker). Griffin asked Duncan if she was aware of the allegations in the report, to which Duncan replied she was not. Duncan then called Taylor-Cobbs on the phone. In that phone call, Duncan told Taylor-Cobbs that she was the subject of a criminal investigation. Taylor-Cobbs then asked Duncan for the details of the allegations made against her, and Duncan replied that she did not know the details. Duncan then offered to put Griffin on the phone line. That occurred, and Duncan then called Griffin and conferenced her into the phone call so that a 3–way conversation occurred. When Griffin got on the phone, she asked

Taylor-Cobbs if she knew of the report, to which Taylor-Cobbs replied in the negative. Griffin then told Taylor-Cobbs what information was contained in the report.

12. The shakedown referenced in Finding No. 8 occurred on April 10, but no marijuana was found. However, a K-9 dog found traces of marijuana.

13. That same day (April 10), department managers learned that the report referenced in Finding No. 8 was not properly restricted on the RMS (meaning it was unlocked), and was being accessed and read by COs. The report was subsequently deleted to prevent others from accessing and reading it. Shortly thereafter, department managers also learned that the subject of the ongoing criminal investigation (i.e. CO Taylor-Cobbs) had been told of the report and the allegations against her. Upon learning that, department managers concluded that the criminal investigation into CO Taylor-Cobbs' actions had been compromised, and there was no point in continuing it (i.e. the criminal investigation) any further. Consequently, the criminal investigation into CO Taylor-Cobbs' actions was closed due to a lack of evidence. The Sheriff's office then initiated an internal investigation into the matter.

14. Lt. Douglas Holton from the Internal Affairs Division was assigned the task of performing that investigation. On May 4, Lt. Holton interviewed CO Janik. In that interview, Janik admitted to telling CO Taylor-Cobbs about the report and showing it to her. When Lt. Holton asked Janik in the interview what his intent was in informing Taylor-Cobbs, Janik stated that "[He] was gonna notify her and let her know 'cause that's what, you know, you stick together. Officers – that's what we do." On May 5, Lt. Holton interviewed CO Duncan. In that interview, Duncan said she did not access the report, but was informed of its contents and then she told CO Taylor-Cobbs what she knew. Duncan also told Lt. Holton that when she learned that Taylor-Cobbs did not know, or claimed not to know of the allegations in the report, she (Duncan) wanted Taylor-Cobbs to have the details of the report because if she was in trouble, she could get help. On May 15, Lt. Holton interviewed CO Griffin. In that interview, Griffin admitted to telling CO Taylor-Cobbs about the report. When Lt. Holton asked Griffin what her intent was in informing Taylor-Cobbs of the report during their conference call, Griffin responded that it was necessary to tell Taylor-Cobbs that she was named in the report because "inmates have the upper hand at times and I know how it is being an officer." Lt. Holton subsequently interviewed every other CO who accessed the report referenced in Finding No. 8. These other COs accessed and read the report, but did not talk to CO Taylor-Cobbs about it. Additionally, these COs did not share the details of the report with other coworkers, and also did not inform a supervisor of the report.

15. Lt. Holton's investigation concluded that three COs – Janik, Griffin and Duncan - informed CO Taylor-Cobbs about the report referenced in Finding No. 8. Lt. Holton found that Janik was first to tell Taylor-Cobbs. Lt. Holton found that when Griffin and Duncan informed Taylor-Cobbs of the report, she already had knowledge of it, even though she claimed no knowledge of it. Lt. Holton determined that the three COs who told Taylor-Cobbs about the criminal investigation (i.e. Janik, Griffin and Duncan) each violated the following Milwaukee Sheriff's Office Rules and Regulations: (1) 202.16 – Knowledge of Laws; (2) 202.17 – Conduct of Members; and (3) 202.20 – Efficiency and Competence. Lt. Holton further found that 14 COs

accessed and viewed the report referenced in Finding No. 8 while it was unlocked on the RMS from April 8 to 13.

16. On June 22, the Sheriff suspended Janik, Griffin and Duncan without pay and made a recommendation to the Milwaukee County Personnel Review Board that they be terminated for the following rule violations: (1) refusing or failing to comply with departmental work rules, policies or procedures; (2) substandard or careless job performance; and (3) engaging in any unauthorized activity, which distracts or disrupts employees in the performance of their duties.

17. On September 14, the Sheriff's office issued a written reprimand to the 14 COs who accessed / viewed the report referenced in Finding No. 8, but did not talk to Taylor-Cobbs or anyone else about it. All the written reprimands were identical and provided in pertinent part: "The above listed Correction Officer failed to notify a supervisor that the above report did not have the proper restrictions on it, and that any staff member had access to it."

18. The Milwaukee County Personnel Review Board (hereinafter PRB) acts in accordance with Wisconsin Statutes and Milwaukee County General Ordinances, and presides over due process hearings for the suspension, demotion, or discharge of County employees in the classified service. The charges filed with the PRB alleged that Janik, Griffin and Duncan violated the following Sheriff's Office Rules and Regulations: (1) 202.16 – Knowledge of Laws; (2) 202.17 – Conduct of Members; and (3) 202.20 – Efficiency and Competence. The charges filed with the PRB also alleged that Janik, Griffin and Duncan violated the following County Civil Service Rules under Section VII, Section 4(1): (1)(l) refusing or failing to comply with departmental work rules, policies or procedures; (2)(u) substandard or careless job performance; and (3)(w) engaging in any unauthorized activity, which distracts or disrupts employees in the performance of their duties.

19. On December 13, 2011, the PRB presided over a hearing as to whether Janik, Griffin and Duncan violated the rules and regulations noted above, and if so, whether the recommended discipline (i.e. discharge) was appropriate. Following the hearing, the Board declined to terminate Janik, Griffin and Duncan, and instead decided to suspend them without pay for time served (i.e. the 6-month period between June 22 and December 13, 2011). The PRB subsequently issued separate written decisions explaining the rationale for its decision in each case. With regard to CO Janik, the PRB found in pertinent part:

> 4. The Board concludes that the evidence is sufficient and that John Janik violated Rule VII, Section 4(1) of the Civil Service Rules for Milwaukee County government, paragraphs (1) "Refusing or failing to comply with departmental work rules, policies or procedures," specifically, Sheriff's policy 202.17 *Conduct of Members*; (u) "Substandard or careless job performance;" and (w) "Engaging in any unauthorized activity, which distracts or disrupts employees in the performance of their duties.

> Upon reviewing the draft version of the report, which stated that a Correctional Officer identified as [CO] MTC was allegedly passing marijuana to at least four inmates, [CO] Janik should have been able to conclude that he should not show a copy of the report to [CO] MTC, which could possibly impair the efficient and effective operation of activities related in the investigation. Instead, he contacted [CO] MTC who then left her post to view the report. [CO] Janik should have notified Lieutenant Buchmann sooner, allowing Lieutenant Buchmann to follow-up on the matter.

With regard to CO Griffin, the PRB found in pertinent part:

> 4. The Board concludes that the evidence is sufficient and that Jermeka Griffin violated Rule VII, Section 4(1) of the Civil Service Rules for Milwaukee County government, paragraphs (1) "Refusing or failing to comply with departmental work rules, policies or procedures," specifically, Sheriff's policy 202.17 *Conduct of Members*; (u) "Substandard or careless job performance;" and (w) "Engaging in any unauthorized activity, which distracts or disrupts employees in the performance of their duties.
>
> Upon reviewing the draft version of the report, which stated that a Correctional Officer identified as [CO] MTC was allegedly passing marijuana to at least four inmates, [CO] Griffin should have been able to conclude that by calling a friend of [CO] MTC, [CO] MTC would find out about the report, which could possibly impair the efficient and effective operation of activities related to the investigation. [CO] Griffin should have been able to discern that the best course of action would be to notify her supervisor that she could access a criminal investigation report of another Correctional Officer.

With regard to CO Duncan, the PRB found in pertinent part:

> 4. The Board concludes that the evidence is sufficient and that Barbara Duncan violated Rule VII, Section 4(1) of the Civil Service Rules for Milwaukee County government, paragraphs (1) "Refusing or failing to comply with departmental work rules, policies or procedures," specifically, Sheriff's policy 202.17 *Conduct of Members*; (u) "Substandard or careless job performance;" and (w) "Engaging in any unauthorized activity, which distracts or disrupts employees in the performance of their duties.

> Upon hearing more details about how the report was accessed, [CO] Duncan should have refrained from calling her friend, [CO] MTC. [CO] Duncan should have been able to discern that the best course of action would be to notify her supervisor that a criminal investigation report of another Correctional Officer was accessible.

20. While COs Janik, Griffin and Duncan didn't think that telling CO Taylor-Cobbs that she was the subject of a criminal investigation compromised or obstructed the Department's criminal investigation of CO Taylor-Cobbs' actions, department managers thought otherwise.

Based on the foregoing Findings of Fact, the Examiner makes and issues the following:

CONCLUSIONS OF LAW

1. Complainants John Janik, Jermeka Griffin and Barbara Duncan are municipal employees within the meaning of Sec. 111.70(1)(i), Stats.

2. Respondent Milwaukee County is a municipal employer within the meaning of Sec. 111.70(1)(j), Stats.

3. The Complainants' disclosure to a fellow employee that she was the subject of a criminal investigation was not "lawful, concerted activity" within the meaning of Sec. 111.70(2), Stats.

4. By disciplining the Complainants for disclosing to a fellow employee that she was the subject of a criminal investigation, Respondent County has not interfered with, restrained or coerced a municipal employee in the exercise of rights guaranteed by Sec. 111.70(2), Stats., and, therefore, the Respondent has not violated Sec. 111.70(3)(a)1, Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following:

ORDER

All three complaints are hereby dismissed in their entirety.

Dated at Madison, Wisconsin, this 3rd day of April 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

POSITIONS OF THE PARTIES

Complainants

The Complainants assert that the County violated Sec. 111.70(3)(a)1 of MERA when it disciplined them for engaging in lawful, concerted activities for the purpose of mutual aid or protection to a coworker. According to the Complainants, this case is not about a criminal investigation, but rather is about the right of municipal employees to communicate with coworkers about workplace issues that may lead to discipline, namely inmate complaints against staff. The Complainants contend that "[c]ase law is clear that Milwaukee County's discipline issued to Complainants in this matter violates the law."

The Complainants begin by noting that Sec. 111.70(2), grants all municipal employees the right "to engage in lawful, concerted activities for the purpose of … mutual aid or protection." Then, they note that Sec. 111.70(3)(a)1 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." They cite *Middleton Fire Protection District*, Dec. No. 31428-C (Michelstetter, 10/07), *aff'd* Dec. No. 31428-D (11/07), for setting the following standard for assessing whether a municipal employer has committed a prohibited practice:

> Violations of Sec. 111.70(3)(a)1, Stats., occur when employer conduct has a reasonable tendency to interfere with, restrain or coerce employees in the exercise of their Sec. 111.70(2) rights. If after evaluating the conduct in question under all the circumstances, it is concluded that the conduct had a reasonable tendency to interfere with the exercise of Sec. 111.70(2) rights, a violation will be found even if the employer did not intend to interfere and even if the employee(s) did not feel coerced or was not in fact deterred from exercising Sec. 111.70(2) rights.

The Complainants go on to note that this right is qualified in certain situations when an employer's legitimate business interests justifies rules that may have a limited effect on protected activity. Thus, the Commission uses a balancing test to determine if an employer has committed a prohibited practice under MERA or whether the employer had a legitimate business reason justifying its rule that otherwise has an effect on protected activity. The Complainants contend that after the examiner reviews the facts involved here, he should find that the County's business necessity defense is pretextual. Here's why.

First, the Complainants assert that their actions were lawful, concerted activity for the purpose of mutual aid and /or protection. To support that premise, they aver that "the record is void of any evidence that the Complainants' actions were anything but legal." It notes in this

regard that while the County's attorney questioned the Complainants at the hearing regarding obstruction of justice, the Sheriff's Office did not attempt to file such charges against the Complainants. Next, they argue that all the conversations that they had with Taylor-Cobbs were concerted and for the purpose of mutual aid and / or protection. To support that premise, they note that when each one of them learned of the report and its allegations, "they undertook intentional, concrete actions to notify the officer who was the subject of the Report." Janik called Taylor-Cobbs over the radio and summoned her to his dorm where he showed her the report. Griffin called Duncan – a fellow correctional officer who knew Taylor-Cobbs – and then when on the phone with Taylor-Cobbs relayed to her "snippets of the report." Duncan called Taylor-Cobbs on the phone directly, and when Duncan confirmed that Taylor-Cobbs had no knowledge of the report (even though Taylor-Cobbs at the time had read the report herself), put Griffin on the line so Taylor-Cobbs could hear directly about the report. The Complainants maintain that they undertook these actions for similar reasons, namely "affording their co-worker the protection of having information that an investigation was underway that may lead to severe discipline." They note that when Lt. Holton asked each of them why they notified Taylor-Cobbs, they each "responded that it was out of a need to protect correctional officers in general, not out of an interest to protect this one officer in this once instance." Specifically, Janik told Lt. Holden that he notified Taylor-Cobbs because he feels that correctional officers "stick together" and that correctional officers need to "have each other's backs" because of the unique environment in which they work. Griffin undertook her actions, which included informing Taylor-Cobbs of the report and its contents, because she feels that inmates have the upper hand in that their complaints are taken seriously and investigated. Griffin also wanted Taylor-Cobbs to have the information to protect herself, so that she had knowledge if questioned about the report or any rumors it generated. Duncan stated she first called Taylor-Cobbs because they are friends, and wanted to hear from her friend if she was okay, but when Taylor-Cobbs informed Duncan that she did not know about the report, then Duncan's motivation evolved to one of professional concern. The Complainants note that they work in a jail among persons who have been charged with or convicted of crimes. As they put it in their brief, "[w]hile correctional officers serve to ensure the inmates' safety, the inmates in turn do not serve the interests of the correctional officers. In fact, inmates frequently lodge complaints against correctional officers in an effort to gain the upper hand or to punish a disfavored correctional officer." Each of the Complainants thought it was important that Taylor-Cobbs be informed of the existence of the report "so that she could protect herself in whatever way she deemed necessary."

Second, the Complainants argue that the County interfered with their lawful, concerted activity when the County – through the PRB – suspended each of them for about six months solely for conversing with Taylor-Cobbs. The Complainants note that in its written decisions, the PRB tied the discipline to the interaction each Complainant had with Taylor-Cobbs. In each decision, the PRB stated that each Complainant should have gone to management with his or her concern. The problem with that is that it disregarded the Complainants' collective concerns for their fellow officer and interfered with their right to engage in lawful, concerted activity. The Complainants argue that as municipal employees, they surely have the right to discuss potential discipline and the policies underlying possible discipline. As they see it, discussion between employees about "job security" or possible discipline are "inherently concerted" and "protected" even if group action never happened or was never even contemplated. They then go on to cite

several National Labor Relations Board (NLRB) decisions which have involved protected, concerted activity under the National Labor Relations Act. In those cases, the NLRB found that the employees involved had engaged in protected, concerted activity, so their discharges were overturned.

Third, the Complainants contend that the County had no legitimate business interest when it interfered with the Complainants' actions. The Complainants opine that "this case presents unique facts that clearly establish the Respondent's interference exceeded the bounds of any legitimate interest it may have." They acknowledge at the outset that the County has a legitimate, operational interest in restricting illegal drugs coming into the jail. Here, though, the evidence "neither proves the Respondent was actively attempting to restrict the arrival of contraband when the protected activity occurred nor establishes that the Complainants disrupted the Respondent's activities in furthering its operational need in this regard." To support that premise, the Complainants note that after Detective Lorch prepared his initial report, he ordered a search of the inmate's dorm to occur three days later, and then left for vacation. Unbeknownst to Detective Lorch, his report was not locked when he left for vacation, and was therefore available for all correctional officers to view. The Complainants aver that "if the Respondent had concerns about the validity of the inmate's report, then waiting three days to search the dorm and inmates is curious." Additionally, since Detective Lorch completed no work over his vacation, and there is no evidence that the investigation was turned over to a colleague, it can be assumed that the investigation was completely stalled on Friday, April 8 and Saturday, April 9. That means that when the Complainants viewed the report and discussed it with Taylor-Cobbs on April 8 and 10, there was nothing to indicate that the County was taking any action to investigate the inmate's report. Building on that, the Complainants assert that "the record is void of any concrete way in which the investigation was hampered or stymied by the protected activity." They further submit that the County "could not expect correctional officers to refrain from reading an available RMS report and discussing it with one another when there was no rule or policy that required correctional officers to inform a supervisor of the accessibility of certain RMS reports or forbid correctional officers from discussing the contents of RMS reports." Thus, the Complainants maintain that the County exceeded the bounds of any legitimate operational need it may have had.

As a remedy for the County's violation of Sec. 111.70(3)(a)1, the Complainants ask that their discipline be expunged from their records, and that they be made whole for their six month suspensions.

Respondent Employer

The Employer contends that the Complainants were not engaged in protected, concerted activity when all three of them told CO Taylor-Cobbs that she was the subject of a criminal investigation based on information they obtained from Department records. It submits that after Taylor-Cobbs became aware of same, the criminal investigation into her conduct became pointless and was closed. The Employer argues that telling a fellow officer that she is under criminal investigation for providing marijuana to jail inmates simply cannot be considered protected, concerted activity under MERA. The County avers that there are no decisions of the

Commission that would support this conclusion. It maintains that if the Commission were to find that the Complainants' misconduct constituted protected concerted activity, then employees across the state could inform other employees about a pending criminal investigation with impunity. Additionally, it submits that that would compromise internal investigations conducted by municipal employers across the state. It's the Employer's view that MERA should not be construed or applied so as to aid and abet criminal activity. It elaborates on these contentions as follows.

Before delving into the issue of whether the Complainants engaged in protected, concerted activity (as they allege they did), the County raises two preliminary matters. First, it emphasizes that the Complainants bear the burden of proof regarding their contention that the PRB's decision to discipline them violated Sec. 111.70(3)(a)1. Second, it points out that while the Complainants want their disciplinary action overturned, there is no contractual just cause standard to be considered or applied, since the Complainants were not represented by a union at the time of this incident.

Next, the County cites Clark County, Dec. No. 30361-B (WERC, 11/03), for the proposition that when a complainant alleges an independent violation of Sec. 111.70(3)(a)1 – as is the situation here – the case must be analyzed using the four part test the Commission has established for violations of Sec. 111.70(3)(a)3. It then reviews all four elements.

With regard to the first element (i.e. that the employee was engaged in protected, concerted activity), the County contends that telling a fellow employee that she is the subject of a crimination investigation is not protected, concerted activity. To support that contention, the Employer cites the decision of Southern Door County School District, Dec. No. 29959-A (7/2001). In that decision, a school district employee released confidential student information to a union representative. The hearing examiner concluded that while the employee was engaged in concerted activity when she released the information, because the information the complainant released was confidential under federal law, the disclosure of the information was not protected under MERA. The County asks the examiner to reach the same conclusion here.

The County also points out that the Commission has consistently taken into account an employer's valid business reasons in evaluating conduct alleged to have violated Sec. 111.70(3)(a)(1). It notes that in Unified School District, Dec. No. 29074-C (WERC 7/1998), the Commission stated at page 7:

> … SEE GENERALLY, WAUKESHA COUNTY, DEC. NO. 14662-A (GRATZ, 1/78) at 22-23, AFF'D –B (WERC, 3/78)("… some municipal employer actions that, in the broadest and most literal senses of the terms, 'interfere with' or 'restrain' municipal employees' exercise of Sec. 111.70(2) rights have been held not to violate Sec. 111.70(3)(a)1. [citations omitted] Rather, the traditional mode of analyzing whether a violation of those quoted terms as used in the applicable statute has occurred has involved balancing of the interests at stake of the affected

> municipal employes and of the municipal employer to determine whether, under the circumstances, application of the protections of the interference and restraint prohibitions would serve the underlying purposes of the act. [citations omitted]. Id. at 22-23")
> …

Building on that, the County avers that all three of the Complainants were charged with substandard or careless job performance and engaging in unauthorized authority which distracts or disrupts employees in the performance of their duties. According to the County, these are rules of general application and were not adopted or applied in order to interfere with lawful, concerted activity.

The County also argues that each of the Complainants had an obligation not to impede a criminal investigation. It notes in this regard that under Wisconsin law, obstructing a criminal investigation is a Class A misdemeanor. As the County sees it, the Complainants knew or should have known that they were not supposed to interfere with a criminal investigation. However, that's exactly what they did. The County argues that it "strains reason to argue that what may very well constitute a criminal misdemeanor could also be protected concerted activity." That's the Complainants' argument though.

With regard to the second element (i.e. that the employee must show that the employer was aware of the alleged concerted activity), the County acknowledges that the Sheriff and the PRB were well aware of the Complainants' conduct.

With regard to the third element (i.e. that the employee must prove that the employer was hostile to the lawful concerted activity), the County contends there is nothing in the record that would support such a conclusion. It notes in this regard that the Sheriff's Department conducted a thorough investigation into the matter, and afterwards the Sheriff recommended that the three Complainants be terminated based on the investigation. According to the Employer, the record is void of any testimony showing any hostility to the Complainants. Similarly, there is nothing in the record that would demonstrate that the PRB had any hostility to the Complainants. The Employer also notes that the PRB ultimately determined that a suspension was the appropriate discipline rather than termination as recommended by the Sheriff. As the County sees it, this can hardly be viewed as hostility to the Complainants. The Employer further avers that generally when considering whether an employer has interfered with lawful, concerted activity, "the record is replete with a number of examples of bad behavior and bad motive." Here though, there is no pattern or practice of employer hostility. Instead, what happened here is that the Complainants foiled a criminal investigation by telling the suspect that she was the subject of the investigation. The County submits that it has a legitimate interest in keeping illegal drugs out of its correctional facilities and requiring its employees to comply with the applicable laws.

Finally, with regard to the fourth element (i.e. that the employee must show that the employer's actions were motivated, in part, by its hostility toward the employee's protected, concerted activity), the County contends that the decision to discipline the Complainants was not motivated in any way by hostility toward their alleged protected, concerted activity. According

to the Employer, the Complainants have failed to show and establish a nexus between the unlawful hostility and the adverse action. It emphasizes in this regard that the Complainants intentionally impeded a crimination investigation. The Employer submits that there is no causal link between any alleged unlawful hostility and the decision of the PRB to discipline the Complainants for their misconduct.

In sum, then, the County maintains that the Complainants failed to meet their burden of proof. As the Employer sees it, telling a fellow officer about a pending criminal investigation involving the distribution of marijuana in a jail simply cannot be protected, concerted activity under MERA. It therefore asks that the complaints be denied and dismissed.

DISCUSSION

The County's PRB suspended the three Complainants for about six months in 2011. In this case, the examiner is not reviewing the PRB's decision, per se. Instead, what's involved here is the narrow question of whether that disciplinary action (by the County's PRB) violated Sec. 111.70(3)(a)1 of MERA.

Section 111.70(3)(a)1 of MERA makes it a prohibited practice for a municipal employer

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

The "sub. (2)" rights referenced above are the rights guaranteed by Sec. 111.70(2) which states as follows:

> RIGHTS OF MUNICIPAL EMPLOYEES. 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, …

When these two provisions are read together, they establish that when a municipal employer takes action that interferes with, restrains, or coerces employees in the exercise of their Sec. 111.70(2) right, the employer commits a prohibited practice.

Section 111.07(3), which is made applicable to this proceeding by Sec. 111.70(4)(a) provides that "the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence." In the context of these cases, the Complainants have the burden of proof.

As set forth above, municipal employees, such as the Complainants, have a Sec. 111.70(2) right to engage in lawful, concerted activities for the purpose of collective

bargaining or other mutual aid or protection. The phrase "lawful, concerted activities" is sometimes referred to as "protected, concerted activities." The phrases are synonymous. Both often involve participation in organized collective bargaining processes, such as grievance procedures or negotiations. The conduct does not have to involve union activity, though, to be protected by statute. It is sufficient that the activity manifest or further collective concerns regarding wages, hours, and conditions of employment. Purely personal activity that is unrelated to collective employee interests is not protected conduct.

This case does not involve what was characterized above as collective bargaining or union activity. Instead, it involves the phrase "other mutual aid or protection." The "mutual aid or protection" reference is often used to defend employees' rights to act together to try to improve their pay and working conditions or fix job-related problems regardless of whether the employees are unionized. Also, although concerted activity normally requires two or more employees acting together, the action of a single employee may be considered concerted if he or she either involves coworkers before acting or acts on behalf of coworkers.

While I have not yet addressed what it was that the Complainants did, I've decided to assume – for the purpose of discussion – that what they did constituted "concerted activity" that was covered by the "mutual aid and protection" reference in sub (2) above.

The reason I made that assumption is because not all "concerted activity" is protected. In other words, it's not enough that an employee engage in "concerted activity" in order for the conduct to be protected by sub (2). That's because the word that precedes the phrase "concerted activity" in sub (2) is the word "lawful." In most interference cases, there's no question that the employee conduct involved is lawful. Here though, the Employer contends that the employees' conduct was not lawful. The Complainants disagree, and contend that their conduct was lawful.

Notwithstanding the Complainants' contention that the "case law is clear that Milwaukee County's discipline issued to the Complainants in this matter violates the law," there is scant Commission case law dealing with what the term "lawful" – in the phrase "lawful, concerted activity" – references. In fact, in researching this issue, the examiner could find just one such case. It's Southern Door School District, Dec. 29959-A (Burns, 7/2001). For that reason alone, it is important that the case be reviewed in detail. In that case, a school district employee released confidential information to a union representative. The student information that was released by the complainant was determined to be confidential under federal law. The hearing examiner concluded that the complainant was engaged in concerted activity when she released the information. However, because the information the complainant released was confidential under federal law, the disclosure of the information was not protected under MERA. The hearing examiner concluded:

> When Hoelscher provided Kundin with a copy of his letter of May 22, 2000, Hoelscher disclosed information to Kundin that is confidential under the IDEA. Having concluded that Hoelscher disclosed information that is protected from disclosure under federal law, the undersigned need not, and does not, address

> Respondent's argument that Hoelscher disclosed information that is confidential under Board Policy.
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> By disciplining Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work," Respondent disciplined Russell Hoelscher for disclosing information to Association Representative Kundin that is confidential under the IDEA. Under the facts of this case, this disclosure of information is not lawful concerted activity within the meaning of MERA.
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> Respondent did not interfere with, restrain, or coerce any municipal employee in the exercise of rights guaranteed by Sec. 111.70(2), when Respondent disciplined Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work." Thus, Respondent did not violate Sec. 111.70(3)(a)1, Stats., when it disciplined Russell Hoelscher for "release of confidential information to an outside party regarding students with disabilities obtained as part of your work." Accordingly, the Complaint has been dismissed in its entirety.

Southern Door at pp.17-18.

In my view the finding in Southern Door applies to this case. Here's why. As previously noted, not all concerted activity qualifies as lawful and protected. In Southern Door, the concerted activity which did not qualify as lawful and protected involved the release of confidential information covered by federal law. While the information released by the Complainants here was not covered by federal law, it was nonetheless incredibly sensitive and confidential. When the three Complainants learned of this sensitive and confidential information, they did not keep it private but instead disclosed it to the very person who was being investigated (i.e. Taylor-Cobbs). Specifically, all three Complainants told Taylor-Cobbs that she was the subject of an ongoing criminal investigation based on information they obtained from a department record they were able to access. While the Complainants characterize their conduct as simply "communicating" with Taylor-Cobbs "about workplace issues that may lead to discipline," it was far more than that. That's because all three Complainants knew that Taylor-Cobbs was being investigated for distribution of marijuana in the jail. It is clear from the initial report that this was not just an inmate complaint about a corrections officer, but was instead a full-fledged criminal investigation by Detective Lorch. The Complainants should have known what their statutory obligations were. At a minimum, they were not to interfere with, or impede, a criminal investigation. However, that's exactly what they did when they told Taylor-Cobbs that she was the subject of an ongoing criminal investigation. When the Employer learned that Taylor-Cobbs knew that she was the subject of an ongoing criminal investigation, the Employer dropped the investigation into her conduct because she had been tipped off. At that point, the Employer considered it pointless to continue with the investigation and it was dropped.

The foregoing establishes that the three Complainants foiled a criminal investigation when they told the suspect that she was the subject of an investigation. Said another way, the Complainants compromised the Employer's investigation into Taylor-Cobbs' conduct. It suffices to say that they should not have done so.

The Complainants believe it is significant that they were not criminally charged in the matter. What they are referring to is that Sec. 946.41 of the Wisconsin Statutes provides that obstructing a criminal investigation is a Class A Misdemeanor. Under that statute, it is a misdemeanor to obstruct an officer while the officer is performing any act with lawful authority in the officer's official capacity. While the Sheriff's Office did not file obstruction of justice charges against the three Complainants, that did not somehow absolve them from culpability for their actions. In this case, I am not deciding whether their actions were criminal. Instead, what I'm deciding is whether their conduct qualifies as "lawful" concerted activity under MERA.

The Complainants urge me to conclude that the right to engage in protected, concerted activity includes the right to tell a fellow officer that she is under criminal investigation for providing marijuana to inmates at the County Correctional Facility. There are no Commission decisions that support this conclusion. Were I to find that the Complainants' conduct constituted lawful, concerted activity, then employees across the state could inform other employees about a pending criminal investigation with impunity and claim it was protected, concerted activity. That would compromise those investigations. While Sec. 111.70(2) grants municipal employees the right to engage in "lawful, concerted activities," that right needs to be viewed, and balanced, in conjunction with other legal obligations. As it relates to this case, an employee cannot impede an ongoing criminal investigation. Were I to find that an employee could do that so long as it was couched as "protected, concerted activity," that would expand the definition of "protected, concerted activity" well beyond any prior Commission decisions.

Aside from the foregoing, it is noted that in evaluating conduct alleged to have violated Sec. 111.70(3)(a)1, the Commission has also considered whether the employer had a valid business reason for its actions. See Racine School District, Dec. No. 29074-C (WERC, 7/1998) at p.7. Here, all three Complainants were charged with departmental and county rule violations. Specifically, they were charged with failing to comply with departmental work rules, substandard or careless job performance and engaging in an unauthorized activity which distracts or disrupts employees in the performance of their duties. These are rules of general application and were not adopted or applied in order to interfere with any lawful, protected concerted activity. The PRB found that all three Complainants violated these rules when they told Taylor-Cobbs that she was the subject of an investigation by the Respondent. Further, it is noteworthy that while the Sheriff sought to discharge all three Complainants for their conduct, the PRB ultimately determined that a six-month suspension was the appropriate discipline rather than termination (as recommended by the Sheriff). That hardly shows hostility toward their conduct.

I therefore conclude that the Complainants were not engaged in "lawful, concerted activity" within the meaning of Sec. 111.70(2) when they told a fellow officer that she was the subject of a criminal investigation. By doing that, they impeded a criminal investigation.

Additionally, their conduct violated several departmental work rules. As a result, their conduct was not protected by Sec. 111.70(2). Since no violation of Sec. 111.70(3)(a)1 was shown, the PRB's disciplinary action stands. All three complaints are therefore dismissed.

Dated at Madison, Wisconsin, this 3rd day of April 2014.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Examiner