

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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WISCONSIN PROFESSIONAL POLICE ASSOCIATION, Complainant,

vs.

MACGILLIS WIEMER, LLC, CHRISTOPHER MACGILLIS, and  
TIMOTHY WHITSTONE, Respondents.

Case ID: 567.0000  
Case Type: COMP\_MP

DECISION NO. 37788-A

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**Appearances:**

Andrew D. Schauer, Staff Attorney, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appearing on behalf of the Wisconsin Professional Police Association.

Graham P. Wiemer, Attorney, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of MacGillis Wiemer, LLC, and Christopher MacGillis and Christopher MacGillis, Attorney, appearing on behalf of Timothy Whitstone.

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER**

On October 18, 2018, the Wisconsin Professional Police Association filed a complaint with the Wisconsin Employment Relations Commission alleging that MacGillis Wiemer, LLC, Christopher MacGillis, and Timothy Whitstone had committed prohibited practices within the meaning of §§ 111.70(3)(b)1 and (3), Stats. On November 21, 2018, the Commission appointed me to serve as Examiner in the matter. On December 3, 2018, I issued an Order Denying Motion to Dismiss.

A hearing was held on February 14, 2019, in Waukesha, Wisconsin. Waukesha County elected not to appear or otherwise participate in the proceedings. Timothy Whitstone did not appear at the hearing but was represented by counsel. A hearing transcript was received February 20, 2019, and the parties thereafter filed written argument by April 19, 2019. At my request, the record was supplemented on May 13, 2019, with information from Complainant as to its request for attorney fees and costs. Respondents filed a response to that supplemental information on May 17, 2019.

Having considered the matter, I make and issue the following:

**FINDINGS OF FACT**

1. The Wisconsin Professional Police Association (WPPA) is the current exclusive collective bargaining representative of certain public safety employees of Waukesha County. Jim Palmer is the Executive Director of the WPPA.

2. The WPPA and the County are parties to a public safety employee collective bargaining agreement with a term of January 1, 2018 through December 31, 2019.

3. MacGillis Wiemer, LLC, is a law firm.

4. Christopher MacGillis is an attorney.

5. Timothy Whitstone is the President of the Waukesha County Deputy Sheriff's Association. The Association is an affiliate of the WPPA.

6. On October 8, 2018, Whitstone sent the following email to the Waukesha County public safety employees represented for the purposes of collective bargaining by WPPA:

**Subject:** Representation

Wppa was notified this morning that Chris MacGillis had taken over legal representation of us. Please no further contact with Wppa or Brent Hart. If they contact you please direct them to me. Thanks!

Any questions or concerns please relate them to a Board Member.

7. Later, on October 8, 2018, an email exchange began when MacGillis sent Palmer the following email:

**Subject:** Waukesha Deputy Sheriff Labor Union

Mr. Palmer,

Please be advised that MacGillis Wiemer, LLC has taken over legal representation for the Waukesha Deputy Sheriff Labor Union. We will be representing the Union on all matters moving forward.

If you have any questions or concerns, please contact me directly.

8. Palmer responded by sending the following email to MacGillis and Whitstone:

Mr. MacGillis:

Thank you for your e-mail. Pursuant to Wis. Stat. § 111.70(4)(d)1, the WPPA is the exclusive bargaining representative for the employees represented by the Waukesha County Deputy Sheriff's Union. This status, which the WPPA has maintained since first being certified by the Wisconsin Employment Relations Commission in 1979, has been formally recognized in this group's collective bargaining agreements for many years. Please find attached copies of the group's election certification and current contract for your review.

In light of the WPPA's exclusive status, the Municipal Employment Relations Act prescribes a specific process by which changes in representation may occur. If the employees are currently represented, then an election petition to change that representation can only be timely filed: (1) during the 60 days prior to the August 1, 2019 date specified in the deputies' existing contract to initiate the negotiations for a successor agreement; or (2) anytime after the 2018-2019 contract has expired – if no interest arbitration petition has been previously filed and both parties have not ratified a new contract. MUKWONAGO SCHOOLS, DEC. NO. 24600 (WERC, 4/87).

Moreover, please be advised that MERA delineates a number of ways that an employee or an employer can be liable for committing a prohibited practice when they, either individually or in concert with others, interfere with the legal rights afforded employees by an employment contract. That includes the right to the representation contemplated by that agreement. This matter also raises ethical concerns pertaining to your communications with a part whom you knew to be represented by counsel.

Accordingly, we demand that you and whomever you purport to represent cease and desist from any further action regarding this group's representation that does not comport with the clear and basic statutory requisites governing this matter. Rest assured that we will pursue whatever remedies available to us should this directive be met with anything less than full and complete compliance.

I hope this e-mail has served to correct the fundamental misunderstanding that obviously exists relative to the basic issues that surround union representation. The WPPA is the duly-certified exclusive representative for this group, and it will continue to serve its members in this capacity until such time as the statutory prerequisites for a change in representation have been satisfied. If I

do not hear from you by 5 p.m. this Thursday, October 11, that the WPPA's rights as explained herein are understood and that no further effort will be made to obfuscate those rights through the improper assertion that your firm or any other is presently in a position to advocate on behalf of this group, we will have no choice but to take the legal action that we deem necessary and appropriate to enforce the WPPA's exclusive standing and prevent any further interference therewith.

Thank you.

9. MacGillis replied by sending the following email to Palmer with a copy to Whitstone:

Jim,

We disagree with your position.

The WPPA is clearly attempting to bully the Waukesha Deputy Sheriffs. We will not be intimidated. Your actions to date have been unprofessional and unsavory. Particularly disturbing is your email dated October 9, 2018 at 2:26 p.m. that you sent to Jim Richter and Sheriff Severson in which you requested that the Waukesha Deputy Sheriff members' dues be paid directly to the WPPA despite the clearly established past practice. You failed to include the President and Vice President or anyone from my firm on this email. I have been told that the WPPA's recent actions are indicative of why the relationship is over.

The Waukesha Deputy Sheriffs do not think that the WPPA adequately represented its group. I have heard first hand many complaints. The Union voted 79-1 in favor of terminating its relationship with the WPPA and having MacGillis Wiemer, LLC handle its legal representation. The Union reached out to our firm to retain our services. I suggest the WPPA accept these facts and bow out gracefully. As you know, I am willing to discuss this issue with you or anyone else at the WPPA. You can contact me directly at the number listed below.

Bottom line, the Waukesha Deputy Sheriffs will not be intimidated by the WPPA's actions. We are prepared to protect our clients. We are prepared to protect our client's ability to choose their legal representation.

10. Palmer responded by sending the following email to MacGillis:

Christopher,

We will be happy to litigate our disagreement then. The fact remains that the WPPA is the exclusive representative for this bargaining unit, and we will enforce that standing, thus limiting your ability to engage in matters impacting the contract without our participation and consent.

Moreover, regardless of the manner by which the dues have been processed in the past, you should know that the approach does not, in fact, amount to a “past practice,” as the contract language regarding the payment of dues is clear and unambiguous. I would suggest that you take the time to familiarize yourself with the law and contractual terms that pertain to these issues. We intend to afford you that opportunity.

In any event, thank you for your response, and we will proceed accordingly.

11. MacGillis replied by sending the following email to Palmer with a copy to Whitstone:

We are prepared to address. Please accept this email as confirmation that you should not be contacting our client to address these issues. All communications should be through our office.

12. Palmer responded by sending the following email to MacGillis with a copy to Whitstone:

We will communicate with the bargaining unit members as we deem appropriate to discharge our obligations as their exclusive representative.

13. On October 15, 2018, Whitstone sent Palmer the following email with a copy to MacGillis:

Mr. Palmer:

We have received your email regarding the WPPA representing the Waukesha County Labor Union. I don't believe our collective schedules would line up for a meeting, so I'm going to outline our position and how we got here via this email.

Myself and other board members have been approached by members frustrated by the lack of attention, lack of preparedness and a distinct lack of desire to fight for the represented group. If this were an isolated issue, we would simply chalk it up to poor representation from our business agent, and request a substitution. However we believe this is a representation of the WPPA in general. Members have told us they wanted to part ways with the WPPA for awhile (sic), and for reasons we can only speculate on, those concerns were met with silence and inaction. A closer examination of our membership revealed that the overwhelming feeling is that the WPPA has breached its portion of the contract with regards to adequate representation.

Our local has seen an extreme uptick in disciplinary issues commencing with the new Sheriff. One particular issue has been the "Brady" issues and our administrations interpretation of that case. Brian Fredericks and then President Soneberg met with Waukesha County District Attorney and queried her as to "Brady" issues. Mrs. Opper's opinions are in stark contrast to that of our administration. Then president Soneberg asked the WPPA for clarification on "Brady" issues. Astonishing to us was the written opinion authored by staff attorney Roger Palek, which clearly sided with administration's opinion and not actual case law, nor the opinion of Mrs. Opper, who would be the exclusive decision maker on this type of scenario.

One of our members provided the name of Chris MacGillis as an alternative to the WPPA for union matters. After we reached out to him, we, (the board & membership) had the opportunity to meet with Mr. MacGillis as well as check with agencies he and his firm represent. After that, the Board felt as though switching to MacGillis Wiemer was in the best interest of the group. We deserve an aggressive approach to disciplinary and collective bargaining, and this has been notably absent during the recent years of the WPPA representing us. We put a ballot vote together for membership to decide the direction they wished to go. The vote was an astounding 79-1 in favor of separating from the WPPA. I can tell you that this has been the largest turnout for a union related vote in numerous years. As such, the Board decided to retain the law firm of MacGillis Wiemer for our union needs. Based on the vote of our membership, as well as the lack of representation from the WPPA, we made that move. We sincerely hoped that you would have respected the membership's decision to separate from the WPPA. Sadly that did not happen. Your email to Sheriff Severson and HR Director Jim Richter has us baffled, angry and more determined to

separate from the WPPA. The membership sees your redirecting of our money, as nothing short of usurping our money.

In closing sir, we intend to use the representative of our collective choosing as granted to us by Wisconsin State Statute (sic) 164. We kindly ask that you discontinue interfering with our union as this methodology has been noted by other agencies. Thank you for your consideration on this matter.

Respectfully,

Tim Whitstone

On behalf of the Waukesha County Sheriff's Union

Based on the above and foregoing Findings of Fact, I make and issue the following:

### **CONCLUSIONS OF LAW**

1. MacGillis Weimer, LLC is a person within the meaning of § 111.70(1)(k), Stats.
2. Christopher MacGillis is a person within the meaning of § 111.70(1)(k), Stats.
3. Timothy Whitstone is a municipal employee within the meaning of § 111.70(1)(i), Stats.
4. By his conduct specified in Finding of Fact 6, Timothy Whitstone committed a prohibited practice within the meaning of § 111.70(3)(b)1, Stats.
5. By its conduct specified in Findings of Fact 7, 9, and 11, MacGillis Wiemer, LLC did not commit a prohibited practice within the meaning of §§ 111.70(3)(b)1 and (c), Stats.
6. By his conduct specified on Findings of Fact 7, 9, and 11, Christopher MacGillis did not commit a prohibited practice within the meaning of §§ 111.70(3)(b)1 and (c), Stats.

Based on the above and foregoing Findings of Fact and Conclusions of Law, I make and issue the following:

### **ORDER**

- A. To remedy his violation of § 111.70(3)(b)1, Stats., Timothy Whitstone shall immediately:

1. Cease and desist from in any manner discouraging Waukesha County public safety employees from communicating with or otherwise interacting with the Wisconsin Professional Police Association as to matters related to collective bargaining and contract administration.

2. Take the following affirmative action which I find will effectuate the purposes and policies of the Municipal Employment Relations Act:

a. Immediately provide all Waukesha County public safety employees who are represented for the purposes of collective bargaining and contract administration by the Wisconsin Professional Police Association with a copy of this decision.

b. Make payment in the amount of \$4,409.75 to the Wisconsin Professional Police Association.

c. Within 20 days of the date of this Order, advise me and the Wisconsin Professional Police Association, in writing, of the action taken to comply with this Order.

B. The complaint against MacGillis Wiemer, LLC and Christopher MacGillis is dismissed.

Dated at Madison, Wisconsin, this 23rd day of May, 2019.

**WISCONSIN EMPLOYMENT RELATIONS COMMISSION**

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Peter G. Davis, Examiner



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

The Wisconsin Professional Police Association (WPPA) is the current exclusive collective bargaining representative of certain public safety employees of Waukesha County. WPPA acquired that status by winning a 1979 secret ballot election in which employees chose whether to continue to be represented by Teamsters Union Local No. 695 or to select WPPA as their new representative. Since it won that election, WPPA has served as the sole and exclusive representative of those County public safety employees for the purposes of collective bargaining and contract administration. As the representative, WPPA bargained a 2018-2019 collective bargaining agreement with the County as to wages, hours, and conditions of employment of those public safety employees.

If the public safety employees currently represented by WPPA want to replace WPPA with a new collective bargaining representative, they have a right to seek such a change by means of a secret ballot election conducted by the Wisconsin Employment Relations Commission.<sup>1</sup> Here, a change was sought by unlawful unilateral action.

On October 8, 2018, Timothy Whitstone, President of the Waukesha County Deputy Sheriff's Association, advised all public safety employees represented by WPPA "that Chris MacGillis had taken over legal representation of us. Please no further contact with Wppa (sic) ... . While there is some potential ambiguity as to the meaning of the phrase "legal representation," any ambiguity ends given the unlimited request to employees that they no longer contact WPPA and the content of MacGillis' October 8 email to Palmer. Clearly, Whitstone's October 8 request (as further amplified in his October 15, 2018 email to Palmer) broadly included no contact as to issues of collective bargaining and contract administration, matters as to which WPPA is the exclusive representative.

One of the employees' rights created by § 111.70(2), Stats., is the right to "bargain collectively through representatives of their own choosing ... ." The statutory definition of collective bargaining found in § 111.70(1)(a), Stats., includes both bargaining an agreement as to wages, hours, and conditions of employment and also resolving questions that arise while an agreement is in effect. Thus, for as long as WPPA is the collective bargaining representative chosen by the employees, those employees have the right to have WPPA bargain and administer agreements. Section 111.70(3)(b)1, Stats., makes it a prohibited practice for a municipal employee

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<sup>1</sup> Balancing the right to seek to change the collective bargaining representative by secret ballot election with the need for stability in an existing collective bargaining relationship, the Commission has long standing precedent establishing that requests for such a secret ballot election should be filed during the 60-day period prior to any reopening date specified in an existing bargaining agreement. *Mukwonago Schools*, Dec. No. 24600 (WERC, 4/87). Here, the contractually established reopening date is August 1, 2019, so a request for election could be timely filed from June 3, 2019, through July 31, 2019.

A change in a bargaining representative can also occur if the current bargaining representative elects to end its status and the employer is willing to voluntarily recognize a new representative. Here, efforts to persuade WPPA to "bow out" were not successful. If WPPA were to have "bowed out," it is not known if the County would have been willing to voluntarily recognize the Waukesha County Deputy Sheriff's Association as the new representative.

such as Whitstone to “coerce or intimidate a municipal employee in the enjoyment of the employee’s legal rights, including those guaranteed in sub. (2).” To establish such coercion or intimidation, it is not necessary to show that any employee was actually coerced or intimidated. Rather, it is sufficient to establish that an act had a reasonable tendency to coerce or intimidate.<sup>2</sup> Whitstone’s action clearly meets that standard of proof because a reasonable employee reviewing his email and lacking labor relations expertise would likely decide to honor the request. Therefore, by sending his October 8, 2018 email, Whitstone committed a prohibited practice within the meaning of § 111.70(3)(b)1, Stats.

WPPA contends the law firm of MacGillis Wiemer, LLC and Attorney Christopher MacGillis also violated § 111.70(3)(b)1, Stats., and as “persons” with the meaning of § 111.70(1)(k), Stats., thereby committed prohibited practices as specified by § 111.70(3)(c), Stats. While it is clear that Attorney MacGillis aided and supported Whitstone and engaged in an email “pissing contest” with WPPA Executive Director Palmer, there is no evidence in the record of MacGillis or the MacGillis Wiemer, LLC law firm contacting “municipal employees.” Absent evidence of such contact, I conclude they cannot be found to have coerced or intimidated municipal employees as required by the language of § 111.70(3)(b)1, Stats.

Complainant has requested \$13,229.25 in attorney fees and costs as part of the remedy in this matter. In *Department of Employment Relations*, Dec. No. 29093-B (WERC, 11/98), the Commission concluded that its remedial authority under § 111.07(4), Stats. included an award of attorney fees and costs where the responding party’s defense is “frivolous.” No award of fees and costs was made in that November 1998 decision and none has been made since. Therefore, there is no specific guidance as how the “frivolous” standard can be met. However, § 227.483, Stats. (which provides an alternate basis for awarding fees and costs) provides helpful and persuasive guidance. Section 227.483(3), Stats. specifies:

(3) To find a petition for a hearing or a claim or defense to be frivolous under sub. (1), the hearing examiner must find at least one of the following:

(a) That the petition, claim, or defense was commenced, used, or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) That the party or the party’s attorney knew, or should have known, that the petition, claim, or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

(c) If the proceeding relates to the mining of ferrous minerals

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<sup>2</sup> *WERC v. Evansville*, 69 Wis.2d 140 (1975); *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).

Here, Whitstone's conduct meets the "frivolous" definition set out in § 227.483(3)(b), Stats. After his unilateral illegal act on October 8, 2018, Whitstone learned of the long-standing law he had ignored regarding how to seek a change in a bargaining representative. At that point, Whitstone should have known his action was without a reasonable basis in law or equity. He nonetheless chose not to back off and did not recant his initial email to his fellow employees. Whitstone has not presented a good faith argument for an extension, modification, or reversal of the existing law established by *Mukwonago Schools*. Using the guidance provided by § 227.483(3)(b), Stats., I am persuaded that the "frivolous" standard has been met and that some award of attorney fees and costs is appropriate.

As to the amount of fees and costs, Respondents contest the request for \$13,229.25 as being unsupported by sufficient documentation and excessive in terms of attorney hours. I find the documentation provided to be sufficient, and the number of hours and hourly rate to be within a reasonable range. However, as only one of the three Respondents has been found to have committed a prohibited practice, I conclude that only one-third of the requested fees and costs is appropriate as part the remedy.<sup>3</sup> Therefore, \$4,409.75 is to be paid by Whitstone to WPPA.

Dated at Madison, Wisconsin, this 23rd day of May, 2019.

## WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Peter G. Davis, Examiner

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<sup>3</sup> Some guidance in this regard has been taken from the allocation of fees addressed in § 227.485(4), Stats.