

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WAUKESHA DEPUTY SHERIFFS LABOR UNION, Complainant,

vs.

WAUKESHA COUNTY and MARC MOONEN, Respondents.

Case ID: 488.0003

Case Type: COMP_MP

DECISION NO. 38743-A

Appearances:

Christopher MacGillis and Kevin Todt, Attorneys, MacGillis Wiemer, LLC, 11040 W. Bluemound Road, Suite 100, Wauwatosa, Wisconsin, appearing on behalf of the Waukesha Deputy Sheriffs Labor Union.

Joel Aziere and Saveon Grenell, Attorneys, Buelow, Vetter, Buikema, Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, appearing on behalf of Waukesha County and Marc Moonen.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On February 3, 2020, the Waukesha Deputy Sheriffs Labor Union filed a complaint with the Wisconsin Employment Relations Commission alleging that Waukesha County and Marc Moonen had committed prohibited practices within the meaning of Wis. Stat. §§ 111.70 (3)(a)1. and (3)(b)1. and had also violated Wis. Stat. §164.02. The County and Moonen filed an Answer and Affirmative Defenses on October 5, 2020. That same day, the Commission issued an Order Appointing me as Examiner and I issued a Notice of Hearing.

On October 13, 2020, a video hearing was held. A transcript of that hearing was prepared, and the parties filed written argument by March 23, 2021.

Having reviewed the record, I make and issue the following:

FINDINGS OF FACT

1. Waukesha County, herein the County, is a municipal employer.
2. Marc Moonen, herein Moonen, is a supervisor within the County's Sheriff Department.

3. The Waukesha Deputy Sheriffs Labor Union, herein the Union, is a labor organization that serves as the collective bargaining representative of certain public safety employees within the Sheriff Department. At all times material herein, Taylor Weiss was one of those employees.

4. On December 13, 2019, Weiss forgot she had agreed to work an extra shift and went home. After her absence was reported to Moonen, he called Weiss at her home to ask why she was not working and whether she could still report to work for the remainder of the shift. Weiss told Moonen she had forgotten she had agreed to work the extra shift but could not report to work as she had consumed some alcohol. Moonen told Weiss that they would discuss the matter further the next time she was scheduled to work.

5. On December 16, 2019, Moonen and Weiss met to discuss the missed shift. Prior to their meeting, Weiss had contacted a representative of the Union and asked the representative to be present for the meeting with Moonen because she believed she might be disciplined for missing the shift. The Union representative approached Moonen and Weiss as the two of them began to talk. Moonen advised the Union representative that the meeting was not a disciplinary matter and so her presence was not needed. After satisfying herself that Weiss did not want her to stay, the Union representative left. Moonen and Weiss then had further discussion regarding the missed shift.

6. Subsequently, Moonen discussed the matter with other supervisors and then advised Weiss that her shift exchange privileges were going to be suspended for a period of time. The County reinstated those privileges several days later.

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

CONCLUSIONS OF LAW

1. At all times material herein, Marc Moonen was acting in his official capacity as an agent of Waukesha County.

2. Taylor Weiss had a right under the Municipal Employment Relations Act to request and receive Union representation during any conversation initiated by Moonen that had the objectively reasonable potential to lead to discipline.

3. Because the December 16, 2019, conversation between Moonen and Weiss had the objectively reasonable potential to lead to discipline, Waukesha County, by the action of its agent Moonen, committed a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)1. by depriving Weiss of Union representation.

4. The Wisconsin Employment Relations Commission does not have jurisdiction over alleged violations of Chapter 164 of the Wisconsin Statutes.

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

ORDER

1. The alleged violation of Chapter 164 of the Wisconsin Statutes is dismissed.
2. The alleged violation of Wis. Stat. § 111.70(3)(b)1. is dismissed.
3. Waukesha County, its officers and agents, shall cease and desist from interfering with the exercise of employee Sec. 111.70(2) rights and shall take the following affirmative action:

Distribute the Notice attached to this decision to all public safety employees of the Waukesha County Sheriff Department after it is signed by the designated persons.
4. Within 20 days of the date of this Order, advise the Commission and the Waukesha Deputy Sheriffs Labor Union of the actions taken to comply with this Order.

Issued at Madison, Wisconsin this 12th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter Davis, Examiner

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

As argued in its brief, the Union contends that the County committed a prohibited practice within the meaning of Wis. Stat. § 111.70(3)(a)1. when Moonen deprived Weiss of Union representation on December 16, 2019.¹ The Union further contends that the County violated Weiss's rights under Chapter 164 of the Wisconsin Statutes.

The Commission has held that a municipal employer interferes with a municipal employee's rights under Wis. Stat. § 111.70(2)² when it compels a municipal employee to appear at an investigatory meeting, which the employee reasonably believes could result in discipline, without union representation where the employee has expressly requested such representation at the meeting.³

Here, it is clear that Weiss had a reasonable belief she could be disciplined when she met with Moonen at his request on December 16, 2019. She had missed a shift and Moonen wanted to talk further about that missed shift. In light of that reasonable belief, she requested Union representation and a Union representative was present when Moonen and Weiss began to discuss the missed shift.⁴

Moonen then advised Weiss and the Union representative that the meeting was not disciplinary in nature and the Union representative was not needed. Moonen was not actually in a position to make this assertion because department protocol required at a minimum that he consult with other Department managers before a disposition was reached.⁵ However, in good faith reliance on Moonen's assurance, the Union representative then left after satisfying herself that Weiss was comfortable with her doing so.

Because Moonen was not authorized to make the "no discipline" assurance,⁶ he should not have advised the Union representative that she was no longer needed. The Union representative should have been allowed to stay with Weiss for the remainder of the conversation and the County,

¹ The complaint contained a series of additional factual contentions and claims which were not pursued in the Union's brief.

² "[T]o engage in lawful, concerted activities for the purpose of . . . mutual aid or protection."

³ *City of Milwaukee*, Dec. No. 14873-B, 14875-B, 14899-B (WERC, 8/80); *Waukesha County*, Dec. No. 14662-A (Gratz, 1/78), *aff'd* by operation of law, Dec. No. 14662-B (WERC, 3/78).

⁴ The Union correctly argues that the Union representative would be entitled to be present even if no discipline was ultimately imposed. The exercise of the statutory right in question is triggered by the reasonable belief that discipline may result-not whether discipline is or is not subsequently imposed.

⁵ It appears he made this assertion based in part on his unreasonably narrow view of what might constitute "discipline."

⁶ The brief end of Weiss's shift exchange privileges was "discipline" that was imposed. The County's swift reversal of the discipline hopefully signals the potential for an improvement in the parties' relationship.

by Moonen's action, violated Weiss' right to engage in lawful concerted activity. To remedy this prohibited practice, the County shall cease and desist from future violations and post a Notice advising employees that such future violation will not occur.

Turning to the alleged violation of employee rights established by Chapter 164 of the Wisconsin Statutes⁷, I raised the question of whether the Commission has jurisdiction over alleged violations of the rights created therein. The Union was unable to point to any portion of Chapter 164 or the Municipal Employment Relations Act that provides a persuasive basis for an assertion of jurisdiction and I also find no such basis. Therefore, this complaint allegation has been dismissed.⁸

Issued at Madison, Wisconsin this 12th day of April, 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter Davis, Examiner

⁷ Wisconsin Stat. § 164.02(1) states:

If a law enforcement officer is under investigation and is subjected to interrogation for any reason which could lead to disciplinary action, demotion, dismissal or criminal charges, the interrogation shall comply with the following requirements:

(a) The law enforcement officer under investigation shall be informed of the nature of the investigation prior to any interrogation.

(b) At the request of any law enforcement officer under interrogation, he or she may be represented by a representative of his or her choice who, at the discretion of the officer, may be present at all times during the interrogation.

⁸ The complaint also referenced an alleged violation of Wis. Stat. § 111.70(3)(b)1. as to Moonen's conduct. That statutory provision focusing on "municipal employee" misconduct is generally understood to focus on alleged union misconduct and, in any event, cannot apply to the acts of a supervisor who is not "municipal employee." Had Moonen been acting as something other than the County's agent, any allegation toward him personally would have focused on Wis. Stat. § 111.70(3)(c). Therefore, the alleged violation of Wis. Stat. § 111.70(3)(b)1. has been dismissed.

NOTICE

Pursuant to an Order of the Wisconsin Employment Relations Commission and in order to effectuate the policies of the Municipal Employment Relations Act, we hereby notify all public safety employees of the Waukesha County Sheriff Department that:

Waukesha County, its officers and agent, will not interfere with any employee's right to have a representative present during any compelled meeting with a County representative which the employee reasonably believes might lead to discipline.

WAUKESHA COUNTY

By: _____
Marc Moonen

Date _____

By: _____
Waukesha County Executive

Date _____