

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MILWAUKEE COUNTY DEPUTY SHERIFFS' ASSOCIATION
(DEPUTY SHERIFF ROLLAN PARISH), Complainant,

vs.

COUNTY OF MILWAUKEE (SHERIFF'S DEPARTMENT), Respondent.

Case 572
No. 64884
MP-4166

Decision No. 31428-B

Appearances:

Jonathan Cermele, Cermele & Associates, S.C., Attorneys at Law, 6310 West Bluemound Road, Suite 200, Milwaukee, Wisconsin 53213, appearing on behalf of Milwaukee County Deputy Sheriffs' Association.

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North Ninth Street, Room 303, Milwaukee County Courthouse, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

ORDER ON REVIEW OF EXAMINER'S DECISION

On July 19, 2006, Examiner David E. Shaw issued Findings of Fact, Conclusions of Law and Order with Accompanying Memorandum in the above-captioned matter, concluding that the Milwaukee County (Sheriff's Department) (hereafter County) removed Deputy Sheriff Rollan Parish from his temporary Sergeant position based at least in part upon hostility towards Deputy Parish's exercise of lawful, concerted activity, in violation of Secs. 111.70(3)(a)3 and 1, Stats. The Examiner ordered the County, *inter alia*, to restore Deputy Parish to the temporary Sergeant position and make him whole for the difference in pay and benefits he would have received.

On August 4, 2006, the County filed a timely petition seeking review of the Examiner's decision pursuant to Secs. 111.07(5) and 111.70 (4)(a), Stats. Both parties thereafter filed written argument, the last of which was received on October 2, 2006. For the reasons discussed in the Memorandum that follows, we have affirmed the Examiner's decision in all respects.

No. 31428-B

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

ORDER

The Examiner's Findings of Fact, Conclusions of Law and Order are affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 12th day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

COUNTY OF MILWAUKEE (SHERIFF'S DEPARTMENT)

MEMORANDUM ACCOMPANYING ORDER

Summary of the Facts

As noted in the preceding Order, we have affirmed the Examiner's Findings of Fact, which can be summarized as follows.

At all relevant times, Deputy Rollan Parish has been a law enforcement officer employed by Milwaukee County and as such a member of the collective bargaining unit represented by the Milwaukee County Deputy Sheriff's Association (hereafter Union). In the fall of 2002, Parish took the civil service examination for promotion to Sergeant and was ranked fifth out of 105 exam participants. On April 22, 2004, Sheriff David Clarke (the Sheriff) issued an Order in which he "temporarily promoted" Deputy Parish to the rank of Sergeant. Parish thereafter carried the duties, uniform, insignia, and pay of a Sergeant until he was removed from the position by an Order of the Sheriff dated May 24, 2005. There is no dispute that Parish had a good disciplinary record throughout his employment, both before and after his temporary promotion.

At all relevant times, the County's Civil Service Rules provided that candidates who pass a promotional examination are placed on a certified eligibility list in the rank order of their scores. When there is a vacancy, the Sheriff is given the top ten names from which to choose. If there are additional vacancies, the Sheriff is given an additional two names for each additional vacancy.

Parish believed that, once he had received the temporary promotion, he would serve as a Sergeant until the individual who had been the incumbent officially left the Department, at which time he (Parish) would be moved permanently into the position. After nearly a year had passed without receiving a permanent appointment, Parish became concerned and, in May 2005, sometime prior to May 23, 2005, he met with Inspector Kevin Carr, the Sheriff's second in command, to discuss the situation. Carr assured Parish that the Sheriff's office was still committed to permanently promoting Parish to Sergeant. However, Carr also explained that the County would be conducting another Sergeant examination, and that the Sheriff would be requesting certification of the entire list of those who passed the examination so that he could promote from the entire list, rather than being restricted to the top ten (or additional two per vacancy). Parish was concerned about having to retake the examination and that his rank on the list would no longer matter in terms of promotion eligibility.

Sheriff Clarke formally requested the County's Civil Service Commission to waive the Civil Service rule requiring certification of the top ten (or additional two per vacancy) and the request was placed on the agenda for the Commission's May 23, 2005 meeting. The Union opposed the request, preferring that the promotions continue to be based closely upon the results of the competitive examination. The Union's President, business agent, attorney, and

various members of its Board of Directors, attended the May 23 meeting. The Union President and the Union attorney sat at a table. Deputy Parish was seated in the audience. The Union's attorney made a presentation on behalf of the Union and in opposition to the Sheriff's request. Inspector Carr along with Ms. Minnie Linyear from the County's Human Resources Department appeared and spoke in support of the request. At the conclusion of Inspector Carr's remarks, he pointed out to the Commission that one of the affected individuals, Deputy Parish, was present in the room and he then invited Parish to comment. Parish came forward and sat at the Union's table. In his remarks to the Commission, which were polite and professional in tone, he expressed confusion about his own status and concerns about the Sheriff's request, such as its departure from the competitive process, the possibility that the promotional criteria might include things that could not be tested, such as sharing the Sheriff's vision for the agency (one of the considerations the Sheriff had highlighted in a March 2005 posted memorandum to the staff about promotions), and that he might not be considered for promotion regardless of his score. During Parish's remarks, Carr exhibited displeasure or disagreement by sighing, shaking his head occasionally, and interrupting Parish to debate certain points. After the meeting ended, Parish attempted to speak with Carr but was ignored.

The next day, May 24, 2005, Carr scheduled a meeting with Parish for May 25, 2005, at Carr's office. At the May 25 meeting, Carr told Parish that the Sheriff had directed him to have a meeting with Parish regarding the May 23, 2005 hearing. During the conversation, Parish reiterated the concerns he had voiced about the Sheriff's proposed selection process. Carr stated that he had spoken to the Sheriff about Parish's presentation and that the Sheriff was unhappy with Parish's attendance there and considered him to be "disloyal" and "untrustworthy." Parish disputed that characterization both in terms of his conduct at the meeting and his years of service. Carr informed Parish that he had the option of resigning his Sergeant position or the Sheriff would make the decision for him. Parish declined to resign.

After the meeting, Parish returned home, about fifteen minutes' drive away, where he found two telephone messages from supervisory personnel, both informing him that he had been removed from the Sergeant position and returned to a Deputy I position. At 1:34 p.m. that same date, May 25, an Order dated May 24, 2005 from the Sheriff was faxed to the Department rescinding "effective immediately" the Sheriff's earlier order promoting Parish to the rank of Sergeant. Thereafter Parish no longer engaged in the duties or received the salary, accoutrements, or benefits accorded to Sergeants.

Subsequent to May 25, 2005, the Union filed an action with the Milwaukee County Personnel Review Board (PRB) claiming that Parish had been demoted improperly without due process. The Sheriff (through the County Corporation Counsel's office) opposed the action on the ground that the PRB lacked jurisdiction over a situation like Parish's, where he had never held the position on a permanent basis. The PRB then dismissed the action on the ground that it did not have jurisdiction, suggesting that the County Civil Service Commission and/or the collective bargaining agreement grievance procedure would provide more appropriate forums. Neither Parish nor the Union pursued a grievance under the contract or an action before the Civil Service Commission.

The Examiner's Decision and the Issues on Review

The Examiner held that the Commission had jurisdiction to decide whether the Sheriff's action in removing Parish from the temporary Sergeant position was a prohibited practice under the Municipal Employment Relations Act (MERA), since the Commission has explicit original jurisdiction to decide whether adverse action was taken in retaliation for an employee's lawful, concerted activity. The Examiner also held that the Union had met its burden to establish that Parish had engaged in lawful, concerted activity by his comments to the Civil Service Commission, that the Sheriff was aware of this activity, was hostile towards it, and took the adverse action against Parish at least in part out of that hostility.

On review, the County challenges all of the Examiner's holdings. According to the County, the PRB has jurisdiction to determine the propriety of disciplinary action against a deputy sheriff. Since, according to the County, Parish advanced all of the same claims to the PRB that he is advancing in the instant prohibited practice case, and since the PRB, after a hearing, ruled adversely to Parish and its ruling was not challenged through the appropriate court venue, the PRB decision carries preclusive effect for the instant claims.

On the merits, the County contends that the Examiner drew factual conclusions that lack support in the record. In particular, according to the County, the record lacks evidence that the Sheriff was aware of Parish's protected activity at the time the Sheriff demoted Parish and that Parish was acting in concert with the Union rather than solely in his own self-interest. The County also challenges the Examiner's remedy, which, in the County's view, ordered that Parish be promoted, in contravention of the County Civil Service Commission's authority, and ordered that Parish be reassigned to a specific assignment, in contravention of the Sheriff's constitutional authority. The County finally contends that, as Parish had no "right" to retain a temporary promotion, the Commission cannot enforce such a "right" by reinstating him to that temporary promotional position.

DISCUSSION

1. Jurisdiction

The County's jurisdictional arguments are without merit. The Examiner cited the Commission's jurisdictional authority in Sec. 111.70(4)(a), Stats., and Sec. 111.07(1), Stats., and properly noted:

[I]t is clear that the WERC has jurisdiction to decide whether the alleged actions by Milwaukee County constituted prohibited practices within the meaning of MERA. In making such determinations, it is sufficient to determine whether the Sheriff took an adverse employment action against the employee. It is not necessary to determine whether Parish was temporarily "promoted" or "temporarily assigned" to the Sergeant's position, or whether his removal from the position was a "demotion" within the meaning of the County's Civil Service Rules or Ch. 63 of the Wisconsin Statutes... .

Examiner's Decision at 23. While the courts have concurrent jurisdiction over prohibited practice cases, the PRB clearly does not. It is a cardinal principle of claim preclusion doctrine that a claim is not precluded unless there is a final judgment on the merits by a forum of competent jurisdiction. See discussion in STATE OF WISCONSIN (AUDREY METHU), DEC. NO. 30808-A (WERC, 1/06), at 7-12, and cases cited therein. Accordingly, the PRB's decision to dismiss Parish's Civil Service claims for lack of jurisdiction has no bearing whatsoever upon the Commission's jurisdiction to decide the instant prohibited practice claims.

2. Retaliation against Parish's Lawful Concerted Activity

The Examiner properly noted that the Union's essential claim here is that the Sheriff's action in removing Parish from his temporary Sergeant position was in retaliation for his comments at the Civil Service Commission meeting on May 23, 2005 and therefore is subject to the four-part analysis for discrimination claims, whether brought pursuant to Sec. 111.70(3)(a)1 or (3)(a)3, Stats. CLARK COUNTY, DEC. NO. 30361-B (WERC, 11/03), at 15. The Examiner also properly set forth those four elements, i.e., that the employee had engaged in lawful, concerted activity within the scope of Sec. 111.70(2), Stats.; that the employer was aware of the employee's activity; that the employer was hostile to that activity; and that the employer's adverse action against the employee was motivated at least in part by that hostility. MUSKEGO-NORWAY CSJSD No. 9 v. WERB, 35 WIS. 2D 540 (1967).

As to the first element, the County contends that Parish was present at the meeting on May 23 "to serve his own self interests. ... He was not a union official by his own testimony. His participation had nothing to do with the union." (County's Brief at 2). As to the relevance of whether or not Parish was officially acting on behalf of the Union, it is well established that "Concerted activity need not be associated with a union, as such ... in order to have a purpose of 'mutual aid or protection' within the ambit of Sec. 111.70(2), Stats." CLARK COUNTY, *supra*, at 12, and cases cited therein. As to whether Parish was simply serving his own self interests, the Examiner properly cited VILLAGE OF STURTEVANT, DEC. NO. 30378-B (WERC, 11/03), and its underlying authorities, to support his conclusion that Parish's comments were for "mutual aid or protection" in substance and in style:

Here, the evidence is un rebutted that Parish shared many of the same concerns with the Sheriff's proposed procedure for promotions that were expressed by the Association's representatives at the May 23, 2005 meeting of the Civil Service Commission. While Parish originally intended to attend the meeting to satisfy his own curiosity as to exactly what the Sheriff was proposing because of his concern with his own promotion, and had no intention on speaking on the Association's behalf (going so far as to ask Association President Felber not to point him out), that changed when Inspector Carr pointed Parish out as an example of someone who would benefit under the Sheriff's proposed procedure and asked him to tell his side. At this point Parish chose to publicly align himself with the Association's position opposing the Sheriff's request to alter the promotion procedures. By seating himself at the table with the Association's

President and legal counsel and voicing some of the same concerns the Association had expressed at the meeting, Parish can only be viewed as speaking in support of the Association's collective position regarding the Sheriff's request.

Examiner's Decision at 25-26. We concur with the Examiner that Parish was engaging in lawful, concerted activity that was protected under MERA.

As to the second, third, and fourth elements of the four-part retaliation paradigm, the County claims that "Nothing in the record ever points to the Sheriff," and "Parish was removed from his job before he even had his supposedly confrontational meeting with Inspector Carr" on May 25. County's Brief at 2. These arguments are unconvincing given the unambiguous state of the evidentiary record. First, the Union is not claiming that the Sheriff removed Parish from his Sergeant position out of hostility toward Parish's confrontational meeting on May 25 with Carr. Rather, the claim is that the Sheriff was angry about Parish's comments at the May 23 meeting of the Civil Service Commission – which clearly and immediately predated the Sheriff's order rescinding Parish's temporary promotion, which was dated May 24 and promulgated on May 25. Second, the evidence "pointing to the Sheriff" came directly from Carr, who told Parish that the Sheriff was angry about Parish's comments at the Civil Service Commission meeting, that the Sheriff believed those comments reflected disloyalty, and that the Sheriff would remove Parish from his Sergeant position if Parish chose not to resign from it. While the County opted not to have either Carr or the Sheriff testify at the hearing in this matter, Parish clearly and firmly testified to Carr's comments. Neither Carr's statements to Parish, nor Carr's recitation to Parish of the Sheriff's statements to Carr, are hearsay within the Rules of Evidence. WISCONSIN RULES OF EVIDENCE, RULE 908.01(4)(b). Those statements may be and have been taken for the truth of what they asserted: that the Sheriff was aware of Parish's activity, that he was hostile towards it, and that he withdrew Parish's temporary promotion in retaliation for that activity. In addition, we note, as did the Examiner, that the County had admitted to the alleged conversation in its Answer to the Complaint.

In short, this record contains un rebutted direct evidence of improper motivation, and the Examiner's conclusion that the County violated Secs. 111.70(3)(a)3 and 1, Stats. is affirmed without reservation.

3. The Remedy

The Examiner ordered the standard remedy in a retaliation case: rescind the unlawful adverse action, make the employee whole for lost compensation, and, with regard to other employment decisions, including promotional decisions, treat the employee as though the adverse action had not occurred. SEE VILLAGE OF STURTEVANT, *supra*.

The County characterizes the Examiner as having "ordered a promotion" and "granted a specific assignment," which conflicts with the authority of the County Civil Service

Commission and the Sheriff's constitutional powers. The County has cited no authority for either proposition and we find none. First, the Examiner did not order Parish promoted; he merely ordered him restored to the "temporary Sergeant" position in which he had been placed by the Sheriff for nearly a year prior to events giving rise to this case. The Examiner expressly acknowledged the questionable legality of the Sheriff's practice of temporarily promoting deputies, as he had done with Parish, and noted that the reinstatement order extended only to restoring whatever status Parish held prior to his removal. We concur and make explicit that the reinstatement order is limited to the boundaries of the Sheriff's lawful authority. As to Parish's assignment, we see nothing in the Examiner's Order that specifies the exact duties to which Parish must be assigned, save that the "conditions" of his reinstatement must reprise those that existed at the time of his removal. So long as the Sheriff treats Parish as he would have been treated absent the Sheriff's unlawful animus and unlawful removal, the Order does not address Parish's assignment. Hence, to the extent constitutional prerogatives apply to the Sheriff's assignment decisions, nothing in the Examiner's Order, as affirmed by the Commission, purports to interfere with such prerogatives.

For the foregoing reasons, the Examiner's decision is affirmed in its entirety.

Dated at Madison, Wisconsin, this 12th day of October, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

