

COMPLAINT INVESTIGATION

This matter represents a request from the Village of Ashwaubenon (the “Village”) that we engage in an investigation of a complaint made by Village Manager, Allison Swanson (“Ms. Swanson”), submitted on February 13, 2020. Her complaint indicated the following:

I am requesting the Village review the press release of the Ashwaubenon Public Safety Association and the actions and statements of provided by specific members of the public safety department including Eric Paulowski, Melanie Lovato, Ben Walker, Tom Baxter, Jody Crocker, Jamie Zynda, and Jason Demerath and others that contributed to the false and misleading allegations contained in the press release. The public attack and allegations by these people contain numerous lies and imply illegal and unethical conduct by me. I feel their actions violate 4.14 and 4.16 of the Village Personnel Manual pertaining to the anti-harassment policy and whistleblowing policy of the Village due to my enforcement (and perceived enforcement) of anti-harassment, family medical leave act, as well as other state and federal laws and Village policies and procedures. Furthermore, I am concerned that many of the allegations contain decisions made by other people within our organization and if it were known who actually made certain decisions, these people would similarly be subjected to harassment by these employees.

I am willing to cooperate in any way I can to ensure that all employees in the Village can seek enforcement of Village policies without retribution and harassment.

A copy of the Complaint is included with this Report as **Appendix 1**.

The Village President assigned this matter for investigation to the undersigned, James Macy, in coordination with Village Attorney Tony Wachewicz¹. Mr. Wachewicz is the Village Attorney and reports to the Village Board. Pursuant to Village Code, the Village Attorney is authorized to investigate complaints alleging violation of the Village Code. *See Section 2-3-538*. Mr. Macy is an employment lawyer with the law firm of von Briesen & Roper and a resident shareholder in the firm’s Oshkosh office. Mr. Macy has represented municipalities for over 35 years. Both were instructed to provide a full, fair and neutral investigation into the Complaint. Neither the Village Board nor the Village Manager have directed Mr. Wachewicz or Mr. Macy in any way as to how they should do the investigation or as to what any outcome should be.

¹ The Association’s statement of “No Confidence” against the Village Manager was also assigned to the undersigned for investigation. A separate investigation was done and a separate investigation report was completed regarding that matter.

This investigation has involved (1) face to face interviews and telephone interviews with a variety of employees and others associated with the Village; (2) review of numerous electronic and paper documents made available in this investigation; and (3) other applicable Village operational documents, such as but not limited to policies, ordinances, agreements and handbooks. Also among the persons interviewed, the investigators interviewed Ms. Swanson.

FACTUAL BACKGROUND

The Village's Administration is directed by a Village Manager. The Village Manager is responsible to the Village Board. The various department heads report to the Village Manager. The current Village Manager, Ms. Swanson, was hired in May 2011 and has been employed since that time to the present.

While most municipalities have a separate police department and a separate fire department, the Village maintains a Public Safety Department (the "Department") which combines police, fire and rescue services along with a variety of prevention and community support functions. The Department is managed by a Director of Public Safety. The current Director of Public Safety is Brian Uhl. Director Uhl began his employment with the Village on February 17, 2020, having been the prior Chief of Police in the Village of Oregon, Wisconsin.

Certain employees within the Public Safety Department belong to a bargaining unit represented by the Ashwaubenon Public Safety Officer's Association. The bargaining unit is comprised of public safety officers. One of the public safety officers is the Village Manager's husband. The Village Manager's husband was an employee of the Village prior to the Village Manager being hired by the Village.

The existing bargaining agreement between the Village and Association expired on December 31, 2019. The parties are in negotiations for a successor agreement and have agreed to extend the provisions of the expired agreement pending resolution of current negotiations.

Aside from the fact that the collective bargaining agreement between the Village and Association is not settled, there have been several grievances and other disputes between the Association and the Village. Some of those matters have been resolved, some have gone to hearing pursuant to procedures for resolving such conflicts, and some are pending a decision in those forums.

On February 6, 2020, the Association issued a statement of "No Confidence" set forth in a document issued through a public press release. The document included with the press release listed approximately twenty (20) incidents occurring over time that resulted in the statement of "No Confidence." Within the statement read at the press conference, Association Board member Melanie Lovato indicated that the incidents set forth in their release were based upon "pure facts and undisputable evidence." She further indicated that support of the statement of "No Confidence" among the Association membership was unanimous.

In response to the statement of “No Confidence”, the Village Manager filed the complaint set forth above resulting in this investigation.

ASSOCIATION’S STATEMENT OF NO CONFIDENCE

As noted earlier, although not submitted to the Village as a formal complaint, the Village did feel it was important to investigate the incidents listed by the Association to support their statement of “No Confidence.” That matter was fully investigated resulting in a separate written report previously completed on March 24, 2020. That report concluded that none of the incidents listed by the Association demonstrated wrongdoing by the Village Manager or the Village. That report noted that some of the Association’s allegations took issue with the Village exercising its rights to make employment decisions, with the Association acknowledging review processes were in place and being utilized by the Association. The report noted that some of the Association’s allegations involved development and policy decisions of the Village, noting that while the Association had the right to its opinion on those matters the incidents did not demonstrate wrongdoing. The report also noted that some of the allegations involved management of the Public Safety Department and challenged important issues to the Association, but again, that did not prove wrongdoing on the part of the Village Manager or the Village. That investigation concluded that upon full review, there was not sufficient actual evidence to support a finding of policy violations or wrongdoing by the Village Manager or Village.

APPLICABLE POLICIES

In support of her complaint, the Village Manager alleges that the incidents set forth in the statement of “No Confidence” included false information, represented lies and lead to misleading allegations. She alleges that by doing so, certain named individuals violated Village Policies 4.14 and 4.16 of the Village Personnel Policy Manual which protects employees against harassment and as whistleblowers. Those applicable provisions read, in part, as follows:

Section 4. 14 Anti-harassment Policy

1. Purpose. The purpose of this policy is to maintain a healthy and safe work environment in which all individuals are treated with respect and dignity and to provide procedures for reporting, investigating and resolving complaints of harassment, workplace violence, and discrimination. Federal and state law provides for the protection of classes of persons discriminated against based on race, color, sex, religion, age (40 and over), disability, marital status, and national origin. Not protected by federal law but also protected by this policy are persons discriminated against based upon their sexual orientation. Harassment on the basis of any of the aforementioned is illegal under Section 111.31-111.39 of Wisconsin Statutes.
2. Policy. It is the policy of the Village that all employees have the right to work in an environment free of all forms of harassment. The Village will

not tolerate, condone, or allow harassment by any employee or other non-employees who conduct business with the Village. The Village considers harassment, workplace violence, and discrimination of others to be forms of serious employee misconduct. Therefore, the Village shall take direct and immediate action to prevent such behavior, and to remedy all reported instances of harassment and discrimination. A violation of this policy will result in discipline up to and including termination. Repeated violations, even if "minor," will result in greater levels of discipline as appropriate, including termination.

A. Prohibited Activity (Sexual Harassment and Harassment)

1. Harassment is any verbal, written, visual or physical act that creates a hostile, intimidating or offensive work environment or interferes with an individual's job performance.
2. No employee shall either explicitly or implicitly ridicule, mock, deride, or belittle any person.
3. Employees shall not make offensive or derogatory comments to any person, either directly or indirectly, based on race, color, sex, religion, age, disability, sexual orientation, marital status or national origin. Such harassment is a prohibited form of discrimination under state and federal employment law and/or is also considered misconduct subject to disciplinary action by the Village.
4. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors and other verbal or physical conduct of a sexual nature when:
 - a. Submission to such conduct is made either explicitly or implicitly a term of condition of employment; or
 - b. Submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting the employee; or
 - c. Such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creates an intimidating, hostile, or offensive working environment.
5. Employees shall not make threats or engage in violent or potentially violent behaviors, including but not limited to:
 - a. Horseplay or other conduct that may be dangerous to others;
 - b. Causing injury to another person;
 - c. Making threatening remarks;

- d. Aggressive or hostile behavior;
- e. Intentionally or carelessly damaging property;
- f. Possession of unauthorized weapons, firearms or other dangerous or hazardous devices or substances on Village property, buildings or vehicles/equipment or while conducting Village business; (secured and locked firearms in personal vehicles are exempt); or
- g. Conduct that threatens, intimidates, coerces or otherwise bullies another person;

...

4. Definitions

Verbal Sexual Harassment: Sexual innuendoes, degrading or suggestive comments, repeated pressure for dates, jokes of a sexual nature, unwelcome sexual flirtations, degrading words used to describe an individual, obscene and/or graphic descriptions of an individual's body or threats that job, wages, assignments, promotions or working conditions could be affected if the individual does not agree to a suggested sexual relationship.

Non-Verbal Sexual Harassment: Sexually suggestive or offensive objects or pictures, inappropriate usage of voicemail, e-mail, the internet or other such sources as a means to express or obtain sexual material, comments etc., printed or written materials including offensive cartoons, suggestive or offensive sounds, whistling, catcalls or obscene gestures. Any material which inappropriately raises the issues of sex or discrimination. Treating an employee differently than other employees when they have refused an offer of sexual relations.

Physical Sexual Harassment: Unsolicited or unwelcome physical contact of a sexual nature, which may include touching, hugging, massages, kissing, pinching, patting, or regularly brushing against the body of another person.

Other Forms of Harassment/Discrimination: Persistent and unwelcome conduct or actions on the basis of disability, sex, arrests or conviction record, marital status, sexual orientation, membership in the military reserve, or use or nonuse of lawful products away from work is prohibited under this policy and s.111.31-111.39, Wisconsin Statutes.

Harassment/Discrimination on any basis (race, sex, age, disability etc.) exists whenever: Submission to harassing conduct is made, either explicit or implicit, a term or condition of an individual's employment; submission to or rejection of such conduct is used as the basis for an employment decision affecting an individual; the conduct interferes with an employee's work or

creates an intimidating, hostile, or offensive work environment. Such conduct is prohibited under this policy and §111.31-111.39, Wisconsin Statutes.

Unwelcome: Sexual conduct is unwelcome whenever the person subjected to it considers it unwelcome. The conduct may be unwelcome even though the victim voluntarily engages in it to avoid adverse treatment.

Extension of the Workplace: Includes, but is not limited to retirement parties, golf outings or any other social gatherings of employees.

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Section 4.16 Whistle-blowing

When the complainant is an employee, the Village shall provide protection against retaliation from individuals who may be negatively impacted by the complaint. Specifically, such complainant may not be disciplined, harassed, ostracized or negatively reassigned solely as a result of the complaint being filed.

This section shall apply to employees filing complaints under this section or reporting any other violation of state or federal law. Any employee suspecting another employee of retaliation in violation of this policy shall notify a supervisor or the Village Manager immediately. Thereafter, the procedures outlined in Section 4.6 C of the Harassment Policy shall be adhered to for investigation and handling of a Whistle-blowing complaint. Any employee acting in violation of this policy shall be disciplined appropriately as determined by the Village Manager.

FINDINGS REGARDING MANAGER'S COMPLAINT

In investigating the Manager's complaint, and in consideration of the information gained in the investigation of the statement of "No Confidence," it can be concluded that allegations within the statement of "No Confidence" were at times inaccurate, at times misleading, at times based upon opinion and at times based upon misunderstanding of facts, procedures, management rights and the law. None of the evidence found that the statement of "No Confidence," nor any of the incidents set forth therein, were directed toward a protected job classification.

The Village's policies regarding the prohibition of harassment in the workplace protect against harassment based upon a protected job classification such as race, color, sex, religion, age (40 and over), disability, marital status, national origin and sexual preference. The tie to protected job classifications is set forth several times within the Village's anti-harassment policy. As the evidence in this investigation did not indicate that the actions related to any of

the protected employment category, the statement of “No Confidence” and actions related to it do not violate that aspect of Section 4.14 of the Village Policy.

I do point out the Section 4.14 includes a brief reference to other prohibited activity which is more often related to preventing workplace violence. Section 4.14 (2) (A) (5) states:

5. Employees shall not make threats or engage in violent or potentially violent behaviors, including but not limited to:
 - a. Horseplay or other conduct that may be dangerous to others;
 - b. Causing injury to another person;
 - c. Making threatening remarks;
 - d. Aggressive or hostile behavior;
 - e. Intentionally or carelessly damaging property;
 - f. Possession of unauthorized weapons, firearms or other dangerous or hazardous devices or substances on Village property, buildings or vehicles/equipment or while conducting Village business; (secured and locked firearms in personal vehicles are exempt); or
 - g. Conduct that threatens, intimidates, coerces or otherwise bullies another person;

There is little doubt that the statements and allegations made against the Village Manager are personal and hurtful. Arguably, the Association’s activity is an intent to intimidate and coerce the Village Manager and Village Board. Yet they do not rise to a level of threats or violence, or potentially violent behavior. In addition, that conclusion would involve speculation as to intent and action of the Association as a labor association, not the individuals named in the complaint. As will be discussed later, the Association has certain rights and protections under that law.

In total, evidence is not sufficient to find that the statement of “No Confidence” and actions taken in association with it are a violation of Village Policy 4.14 – Anti-Harassment.

In addition, the Village Manager suggests she has whistleblower protection based upon her exercise of her duties in bringing forth concerns in upholding Village Policy and the law. For example, that resulted in some employees receiving discipline and certain employee benefit changes.

Yet, in doing her duties, the Village Manager did not become a “complainant” as such set forth in Policy 4.16. As indicated in the investigation report regarding the statement of “No Confidence,” many of the allegations complained of represented the Village Manager doing her job. The Village Board, who the Village Manager reports to, has not acted against her. She is not being retaliated against by the Village. Arguably, the Association’s activity is an intent to retaliate against the Village Manager for the management decisions she has made, and with which they disagree. Yet, that is not retaliation in the sense used for whistleblower protection. In addition, that conclusion would involve speculation as to intent and action of the Association as a labor association, not the individuals named in the complaint. As noted

earlier and as will be discussed later, the Association has certain rights and protections under that law. Policy 4.16 does not appear applicable in this case.

In the investigation of this complaint, the review expanded beyond alleged violations of the Village's Anti-Harassment Policy and Whistleblower Policy as the complaint alleges that employees may have been untruthful and may have violated policy by improperly using internal documents to support their allegations without authorization.

The Association has indicated that statements and supporting allegations were not made as "individuals," but as a labor organization exercising its rights under the law. They argue that certain individuals speaking on behalf of the Association, made such statements as board members of the Association. Within their statement to the press in releasing the statement of "No Confidence," the Association holds that their information was based upon "... pure facts and undisputable evidence".

For background, both state and federal employment law has long recognized employees' rights to engage in protected concerted activity. Under federal law, it has been long recognized that employees and or labor unions do not forfeit the protection under the law to engage in protected concerted activity by making false or inaccurate allegations concerning their employer provided the allegations are not "deliberately or maliciously" false. *See Walls Mfg. Co. v. NLRB, 321 F.2d 753 (1963)*. Conduct disparaging management officials may be protected concerted activity if the remarks relate to employee interests or working conditions and are not egregious in nature. *See Community Hospital of Roanoke Valley, Inc. 90 LRRM1449 (1975)*.

Wisconsin's Municipal Employment Act follows these same principles. In *Clark County, WERC Dec. No. 30361-B (WERC 2003)* and *Village of Sturtevant, WERC Dec. No. 30378-B, (WERC 2003)*, the Wisconsin Employment Relations Commission (WERC) recognized these concepts. In *Sturtevant*, the WERC summarized its case law on the point as follows:

Concerted activity by its nature often occurs in tense, confrontational, or chilly atmospheres, and some intemperance is to be expected in those situations. A mild-mannered complaint is likely to aggravate an employer less than a harshlyworded one, and sometimes it is the vehemence itself that renders concerted activity effective; certainly Section 2 cannot be read to protect only ineffective concerted activity. See *Clark County, Dec. No. 30361-B (WERC, 11/03)*. Thus, unless concerted activity is marked by flagrant misconduct, it does not lose its protection. In addition, what constitutes "flagrant misconduct," will depend upon the nature of the work place and the effect on the employer's authority. For example, in *CKS Tool & Engineering, 332 NLRB No. 162, 168 LRRM 1047 (2000)*, the NLRB deemed protected an employee's obscenityladen speech during a management presentation at a staff meeting, because the employee was deemed to be implicitly acting on behalf of his co-workers and because his language was commonly tolerated by management at such meetings. Some measure of "disloyalty" and "disparagement" are tolerated, even if the employer arguably has suffered some harm to its business. See, e.g., *Allstate Insurance Co., 332 NLRB No. 66,*

165 LRRM 1293 (2000) (insurance agent's activity was protected, where gave interview to a magazine, in which she complained about the company's working conditions); *Arlington Electric, Inc., 332 NLRB No. 74, 166 LRRM 1049 (2000)* (it was protected for an employee to distribute literature to the public urging them not to use a hospital that subcontracted with a company that did not provide family health insurance). Hence, unless the form of expression exceeds the law's liberal parameters, the law does not distinguish between hostility towards the subject matter and hostility towards the attitude or manner of expression. See also *Clark County, Dec. No. 30361-B (WERC, 11/03)*.

I set forth this statement of law not to suggest what is right or even politically astute. I set forth these principles of law to properly weigh it against the evidence in this case. As noted early, the allegations set forth in the statement of "No Confidence" did not result in any finding of wrongdoing on the part of the Village Manager or the Village. The question in this investigation is whether the allegations crossed the line as being "deliberately or maliciously false" to lose the protection of concerted protected activity.

In this case, the evidence indicates that while poorly researched, incomplete and with situations of simply not understanding the law or process, the allegations to support the statement of "No Confidence" do not rise to the level of being "deliberately or maliciously false." It is not comforting to suggest that certain law enforcement personnel may not be thorough and complete in their work, or that they make conclusions without fully understanding process or the law, but in the labor relations context that is protected under the law. Separately, some of the allegations are matters of opinion on political and policy matters. That also is protected under the law.

CONCLUSION

Upon full review of the complaint, along with other concerns raised during the investigation set forth herein, there is not sufficient evidence to support a finding of policy violations by the Association or the individual employees named in the complaint.

Submitted this 28 day of April, 2020.


James R. Macy

von Briesen & Roper, s.c.

2905 Universal Street, Suite 2
Oshkosh, WI 54904

Tony Wachewicz

From: Allison Swanson
Sent: Thursday, February 13, 2020 10:32 AM
To: Tony Wachewicz
Cc: Mary Kardoskee
Subject: Complaint

Tony,

I am requesting the Village review the press release of the Ashwaubenon Public Safety Association and the actions and statements of provided by specific members of the public safety department including Eric Paulowski, Melanie Lovato, Ben Walker, Tom Baxter, Jody Crocker, Jamie Zynda, and Jason Demerath and others that contributed to the false and misleading allegations contained in the press release. The public attack and allegations by these people contain numerous lies and imply illegal and unethical conduct by me. I feel their actions violate 4.14 and 4.16 of the Village Personnel Manual pertaining to the anti-harassment policy and whistleblowing policy of the Village due to my enforcement (and perceived enforcement) of anti-harassment, family medical leave act, as well as other state and federal laws and Village policies and procedures. Furthermore, I am concerned that many of the allegations contain decisions made by other people within our organization and if it were known who actually made certain decisions, these people would similarly be subjected to harassment by these employees.

I am willing to cooperate in any way I can to ensure that all employees in the Village can seek enforcement of Village policies without retribution and harassment.

Allison C. Swanson
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