



Wisconsin Employment Relations Commission

LABOR AND EMPLOYMENT RELATIONS ASSOCIATION

January 14, 2011

WERC UPDATE

By Peter G. Davis- WERC General Counsel **

I. Agency Update

Chairperson Judy Neumann-confirmed for a term expiring March 2013.
Commissioner Sue Bauman-confirmed for a term expiring March 2011.
Commissioner Terry Craney-appointed for a term expiring March 2015.

Sixteen attorneys (11 in Madison and 5 out state) and 4.5 support staff.

Hiring of Matt Greer

Two Attorney vacancies posted-application deadline 1/20/2011

Retirement of Coleen Burns

Office Closures due to Furloughs-2/21/11 and 5/27/11

WERC Conference April 28, 2011

WERC Website-just google WERC

**** The speaker's remarks do not necessarily reflect the views of the WERC. Questions? Contact Peter Davis at 608 266-2993 or peterg.davis@wisconsin.gov.**

II. Statutory Changes

Section 111.70 (3) (a) 9, Stats. makes it illegal for a municipal employer to fail to follow a contractual fair-share provision during a contract hiatus.

Sections 111.70 (3) (a) 8 and (3) (b) 7, Stats., respectively, make it illegal for a municipal employer or union to fail to follow a contractual grievance arbitration provision during a contract hiatus. **(See last page of this outline for some thoughts re deferral implications)**

Effective 7/1/2011, Sec. 111.70 (4) (n), Stats. makes it mandatory to bargain about:

. . . time spent during the school day, separate from pupil contact time, to prepare lessons, labs, or educational materials, to confer or collaborate with other staff, or to complete administrative duties.

Section 111.70(4) (o), Stats. makes it mandatory to bargain about:

. . . the development of or any changes to an evaluation plan under s.118.225.

Section 111.321, Stats. makes it illegal for unions and employers to discriminate against employees for:

. . . declining to attend a meeting or to participate in any communication about religious matters or political matters.

III. Recent Decisions

STATE OF WISCONSIN, DEC. NO. 33169 (WERC, 11/10); Writ of Prohibition pending CirCt Dane.

WERC concludes that it has jurisdiction to determine whether employees designated “academic staff” by the University of Wisconsin are in fact employees eligible to be included in State Employment Labor Relations Act bargaining units.

PULASKI SCHOOLS, DEC. NO. 33037-B (WERC, 11/10)

WERC determines that it is inappropriate to hold alleged duty to bargain, interference and discrimination allegations in abeyance awaiting outcome of related grievance arbitration proceeding noting that arbitration had no potential to resolve the complaint issues and the great importance of the statutory rights in question.

NEENAH SCHOOLS, DEC. NO. 32773-C (WERC, 10/10)

In the context of the facts established, union failure to file a responsive preliminary final offer well after the 14 day statutorily-established time frame did not constitute bad faith bargaining.

SEIU LOCAL 150 V WERC, 2009AP1524, recommended for publication- CTAPP-DIST 1 (8/10)-petition for Supreme Court review denied.

Court reverses WERC conclusion that Union's overall conduct when processing the grievance of a discharged employee breached its duty of fair representation.

GREEN BAY SCHOOLS, DEC. NO. 32602-B (WERC, 6/10)

Where collective bargaining agreement contains a grievance arbitration procedure applicable to alleged violations of contract, that procedure is presumed to be the exclusive procedure for resolving such an allegation and thus WERC will not exercise its statutory jurisdiction to resolve such issues unless an employee asserts that their attempt to use the contractual procedure was unsuccessful because their collective bargaining representative breached its duty of fair representation. In such circumstances, a prohibited practices complaint against the bargaining representative (for breach of the duty of fair representation) and the employer (for violation of contract) is timely if the employee filed a grievance within one year of the date the employee knew or should have known that the employer allegedly violated the bargaining agreement and filed the complaint with WERC within one year of the date the employee know or should have known that the employee's effort to exhaust the grievance arbitration procedure was ended by the bargaining representative.

A bargaining representative's decision to drop a grievance short of arbitration should at least consider the value of the employee's claim, the effect of the alleged breach on the employee and the likelihood of success in arbitration.

CHIPPEWA FALLS SCHOOLS, DEC. NO. 33047 (WERC, 6/10)

Employee is a confidential employee based on her exclusive knowledge of computer program the employer uses to assist it when making decisions regarding bargaining and contract administration and her participation in employer discussions as to such matters.

WAUSHARA COUNTY, DEC. NO. 30222-B (WERC, 3/10)

Where three paralegals in the Corporation Counsel's office interchangeably share a limited amount of confidential labor relations work, only one paralegal is a confidential employee. The other two paralegals are added to the bargaining unit. If employer wishes

to shield the two unit paralegals from confidential labor relations information, that can be accomplished without undue disruption.

ELKHART LAKE-GLENBEULAH SCHOOL DISTRICT, DEC. NO. 27370-C (WERC, 3/10)

Employer gives former bargaining unit Head Custodian sufficient authority as to hiring, discipline, evaluation and direction of work of seven employees to make him a supervisor.

MILWAUKEE COUNTY, DEC. NO. 32728-B (WERC, 1/10)

Employer violated its duty to bargain by refusing to provide union with disciplinary files of a bargaining unit employee which union sought for purposes of determining whether it had a disparate treatment argument in an upcoming grievance arbitration proceeding.

FLORENCE COUNTY, DEC. NO. 32435-C (WERC, 1/10); WEST SALEM SCHOOLS, DEC. NO. 32696-D (WERC, 10/09) see also WAUKESHA COUNTY TECHNICAL COLLEGE, DEC. NO. 32785-B (WERC, 12/09); MILWAUKEE COUNTY, DEC. NO. 32572-B (Davis, 11/09)

In context of pre-hearing motion to dismiss, prohibited practice/unfair labor practice complaints will only be dismissed if even under a liberal interpretation of the content of the complaint itself, a timely claim as to which WERC has jurisdiction has not been raised.

CLARK COUNTY, DEC. NO. 32933 (WERC, 12/09)

Employee is not a supervisor because his role in hiring does not rise to level of an effective recommendation, he has no significant disciplinary authority and he is not on at the work site on a regular basis.

Employee is not a managerial employee because he lacks high level policy-making role and lacks the effective authority to commit the employer's resources.

STATE OF WISCONSIN, DEC. NO. 32689-C (WERC, 12/09)

Employee's discharge was not based on any hostility toward his lawful concerted activity but rather on his failure to heed instructions regarding use of internet on work time.

MILWAUKEE COUNTY, DEC. NO. 32590-B (WERC, 11/09)

Employer conduct did not demonstrate a refusal to comply with a prior grievance arbitration award.

IV. Pending Issues

-Scope of duty to supply information in context of contract administration-FRANKLIN SCHOOLS.

-Duty to bargain over proposal limiting employer right to reduce hours of employees rather than layoff-MILWAUKEE COUNTY.

DEFERRAL IMPLICATIONS OF NEW SECS. 111.70 (3) (a) 8 and (3) (b) 7, STATS. ***

Prior to the new statute, deferral was not a viable motion during a contract hiatus because although union was obligated to exhaust the grievance procedure as part of status quo (see RACINE SCHOOLS, DEC. NO. 29203-B (WERC, 10/98), neither union nor employer were obligated to arbitrate because arbitration was not part of status quo.

With passage of new statute, deferral is now viable motion during a contract hiatus and the same analysis will be applied by WERC whether issue arises during the term of contract or during hiatus.

As a general matter, complaint allegations of interference and/or discrimination (Secs. 111.70 (3) (a) 1 and/or 3, Stats.) will not be deferred as they involve important policy matters within the WERC's specific statutory expertise. Thus, deferral generally limited to alleged duty to bargain/unlawful unilateral changes (Sec. 111.70 (3) (a) 4, Stats)

Key question is:

Whether there is a high probability that the grievance arbitration proceeding will resolve the dispute? See CADOTT SCHOOLS, DEC. NO. 27775-C (WERC, 6/94)

- Is there a contract provision that clearly addresses the matter in dispute?
- Is employer willing to renounce any procedural defenses?
- Is the contractual remedy for any violation sufficient?

ALTERNATIVE TO DEFERRAL MOTION?

Employer can assert that is has already bargained on the matter in dispute and thus that the unilateral change complaint should simply be dismissed-whether or not a grievance was filed/is still pending? Key question for WERC is whether the contract (current or expired) covers the matter in dispute. See CADOTT SCHOOLS, DEC. NO. 27775-C (WERC, 6/94) AFF'D 197 Wis. 2d 46 (1995)

WHAT ABOUT DEFERRAL OR DISMISSAL OF AN ALLEGED CHANGE IN A FREE STANDING PRACTICE THAT IS NOT PART OF THE CONTRACT?

Even though there is a not a substantive contract provision that addresses the matter, if the contractual definition of a grievance and what can be arbitrated is broad enough to include such an issue, deferral motion may still be viable but a CADOTT motion to dismiss is not.

*** Thoughts of WERC General Counsel Davis on 10/21/10-not necessarily the views of the WERC