STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANCIS S. SEVERSON, Complainant, vs. HARRY VINER, INC., Respondent.	:	Case I No 19374 Ce-1616 Decision No. 13828-A

Appearances:
Hale, Skemp, Hanson, Schnurrer & Skemp, Attorneys at Law, by Mr. Thomas S. Sleik, for the Complainant.
Steele, Smyth, Klos & Flynn, Attorneys at Law, by Mr. Charles G. Norseng, for the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Francis S. Severson, having on July 21, 1975, filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission alleging that Harry Viner, Inc., committed unfair labor practices within the meaning of Sections 111.06(1)(f) and 111.06(1)(h) of the Wisconsin Employment Peace Act (WEPA); and the Commission having appointed Peter G. Davis, a member of its staff, to act as Examiner and to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5) of the Wisconsin Statutes; and a hearing on said complaint having been held in LaCrosse, Wisconsin on September 4, 1975, before the Examiner and the parties having thereafter filed briefs which were received by September 22, 1975; and the transcript of said proceeding having been received on February 4, 1976; and the Examiner having considered the evidence and arguments of counsel, makes and files the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Harry Viner, Inc., hereinafter referred to as the Respondent, is an employer operating a construction firm in LaCrosse, Wisconsin; and that Harry Viner is Respondent's owner, and at all times material herein acted as Respondent's agent.

2. That Francis S. Severson, hereinafter referred to as the Complainant, had been employed by Respondent as a crane operator for approximately fifteen years until laid off by Respondent in October, 1974.

3. That at all times material herein the Complainant was a member of the International Union of Operating Engineers Local No. 139; hereinafter referred to as the Union; that Respondent recognizes the Union as the exclusive collective bargaining representative for certain of its employes including the Complainant; that the Respondent and the Union were parties to a collective bargaining agreement, effective at all times material herein, covering the wages, hours and conditions of employment of the Complainant; that said agreement provided for final and binding arbitration of grievances arising between the Union and the Respondent; and that said arbitration procedure was applicable to all disputes regarding alleged violations of the collective bargaining agreement.

4. That in recent years Respondent's utilization of a crane on its job sites had been gradually decreasing due to the availability of other more efficient equipment; that during 1974, prior to his October layoff, Complainant operated the crane for limited periods of time on two job sites, spending a substantial majority of his time performing various types of manual labor.

5. That from the start of the Respondent's construction season on April 19, 1974 until August 16, 1974 the Complainant was paid a rate of $8.29 per hour; that the applicable collective bargaining agreement indicates that crane operators were to receive $8.47 per hour for the period of June 1, 1973 to May 31, 1974 and $8.77 per hour for the period of June 1, 1974 to May 31, 1975; and that during the period of April 19, 1974 to August 16, 1974 Complainant did not file a grievance with the Union regarding his rate of compensation.

6. That effective August 16, 1974 Harry Viner reduced Complainant's rate of pay to $6.70 per hour due to the limited amount of time Complainant was operating the crane; and that Complainant then contacted the Union regarding the decrease in compensation.

7. That late in August, 1974, Harry Viner suffered a serious heart attack and relinquished control of the business to his son, Tom Viner; that shortly thereafter Tom Viner was contacted by Union representative Brown who indicated that Complainant would be pulled off the job site unless he began receiving $8.77 per hour; and that Tom Viner then raised Complainant's rate of pay to $8.77 per hour effective August 30, 1974.

8. That in late September, 1974 Harry Viner resumed control over Respondent's operations and discovered the wage increase received by the Complainant and the attendant circumstances; that Harry Viner was angered by the wage increase and decided to lay off the Complainant; rather than continue to pay the higher rate of compensation; and that on October 4, 1974 Viner told Complainant that he could no longer afford to keep Complainant and that he was therefore laying him off immediately.

9. That shortly thereafter the Complainant contacted the Union regarding his layoff but is unaware of any action which the Union may have taken.

10. That after Complainant's layoff Respondent continued its limited use of the crane utilizing other employes as operators.

Upon the basis of the above and foregoing Findings of Fact, the Examiner makes and files the following

CONCLUSIONS OF LAW

1. That the Complainant failed to exhaust the available contractual arbitration procedure with respect to his allegations that the Respondent violated Sections 111.06(1)(f) of the Wisconsin Employment Peace Act by failing to pay the contractually required wage rate from July 21, 1974 to August 16, 1974, and, therefore the Commission will refuse to assert its jurisdiction to consider the merits of Complainant's allegation.

2. That the Complainant achieved a final settlement through the available contractual grievance procedure with respect to his allegation that the Respondent violated Section 111.06(1)(f) of the Wisconsin Employment Peace Act by failing to pay the contractually required wage rate from August 16, 1974 to August 30, 1974, and therefore the Commission will refuse to assert its jurisdiction to consider the merits of Complainant's allegation.

3. That the Respondent, by laying off the Complainant because of the wage adjustment received on August 30, 1974, did not commit an unfair labor practice within the meaning of Section 111.06(1)(c) of the Wisconsin Employment Peace Act.

Upon the basis of the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

That the complaint be, and the same hereby is, dismissed.

Dated at Madison, Wisconsin this 1st day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

In his complaint, filed July 21, 1975, the Complainant alleged that the Respondent had committed unfair labor practices in violation of Sections 111.06(1)(f) and (h) of the Wisconsin Employment Peace Act (WEPA). More specifically the Complainant alleged that the Respondent violated the collective bargaining agreement by paying him less than the contractually specified rate and then discriminatorily laid him off because he informed the Union of the alleged contractual violation. The Complainant requested that the Respondent be found to have committed the alleged unfair labor practices and that the Respondent be ordered to reinstate Complainant with backpay.

At the hearing the Respondent submitted its written answer which substantially denied the Complainant's allegations and requested that the complaint be dismissed. The Respondent also orally moved to dismiss the complaint on the ground that the Complainant had failed to exhaust the available contractual arbitration procedure.

VARIANCE BETWEEN PLEADINGS AND PROOF

The Examiner notes that Section 111.06(1)(h) of WEPA prohibits an employer from discriminating against an employe because said employe filed a complaint with the Commission alleging a violation of WEPA or gave testimony in a Commission proceeding involving WEPA. 1/ It is further noted that the thrust of both Complainant's allegations and his proof was directed at an allegedly discriminatory layoff resulting from Complainant's contact with the Union regarding Respondent's alleged contractual violations and not at a layoff motivated by employe conduct protected by Section 111.06(1)(h). This variance between the statutory violation alleged and the unmistakable thrust of Complainant's allegations and proof, which raises the issue of a violation of Section 111.06(1)(c) of WEPA, is not fatal to Complainant's case if the Examiner is satisfied that the actual issue presented by the complaint has been fully litigated at the hearing and that there has been no undue surprise imposed upon the Respondent. 2/ As the issue at hand was fully litigated and there is no indication of any element of prejudicial surprise, the Examiner will proceed to treat the pleadings as amended to allege a violation of Section 111.60(1)(c) of MERA.

FAILURE TO EXHAUST THE CONTRACTUAL GRIEVANCE PROCEDURE

At the beginning of the hearing Respondent moved to dismiss the complaint alleging that the Complainant had failed to exhaust the contractual grievance procedure with respect to both the alleged contractual violations and the discriminatory layoff. The Complainant opposed the motion urging that the grievance procedure is unavailable to an individual employe; that if said procedure was available the Union would have failed to fairly represent him; and finally that the

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1/ Sheboygan Dairyman's Co-op Association, (1012) 7/46. (Aff. Sheboygan Co. Cir. Ct.) 9/47.

2/ Home Lumber and Improvement Co. (3304) 10/52, Manpower, Inc. (3854) 11/54.

contractually provided grievance procedure is not applicable to the allegations of discriminatory layoff.

Initially the Examiner must resolve the dispute as to which of the two collective bargaining agreements submitted by the parties governs their relationship and thus provides the applicable grievance procedure. Based upon Viner's testimony that he had only signed the red-covered Building and Heavy Construction contract on Respondent's behalf and Complainant's uncertainty as to the status of either contract the Examiner finds the red-covered Building and Heavy Construction contract to be the applicable collective bargaining agreement. Thus the grievance procedure and wage rates contained therein will be utilized by the Examiner in the following analysis. However, it is noted that both contracts provide for the arbitration of grievances.

For the purposes of responding to Respondent's motion, the Complainant's allegation regarding Respondent's failure to pay the contractually provided wage rate will be divided into two temporally separate allegations. During the period of April 19, 1974 to August 16, 1974 the Complainant received $8.29 per hour and is now alleging that this rate of compensation violated the collective bargaining agreement. Due to the filing of the complaint on July 21, 1975 and the applicable one year statute of limitations contained in Section 111.07(14) of WEPA, only the period of July 21, 1974 to August 10, 1974 will be considered by the Examiner. 3/ With respect to this period, the record indicates that Complainant never made any attempt to utilize the available grievance and arbitration procedure. This Commission has consistently refused to assert its jurisdiction to consider alleged contractual violations when the parties' collective bargaining agreement provides for final disposition of such issues. 4/ Exceptions to this general policy of deferring to the arbitration process arise when both parties waive resort to said process or when the Respondent totally ignores and rejects the contractually provided means for disposition of grievances. 5/

The Complainant has not cited either of these exceptions, but instead has urged that said procedure is unavailable to the Complainant. While it is true that the applicable contractual language does not refer to the individual employe, Complainant has presented no evidence that this language does in fact restrict the availability of the process. Indeed the Complainant later used this very process when confronted with further wage reductions and his eventual layoff. Thus the Examiner rejects the Complainant's contention with respect to the availability of the grievance procedure. There being no indication that the Union would have failed to fairly represent the Complainant if he had utilized said procedure, this assertion is also rejected. Therefore the Examiner finds that with respect to the alleged contractual violation occurring between July 21, 1974 and August 16, 1974, the Complainant failed to exhaust the available grievance procedure and thus the Commission will refuse to assert its jurisdiction to reach the merits of this allegation. Therefore, Respondent's motion with respect to the dismissal of this portion of the complaint is granted.

3/ Reimer Sausage Company (10965-A, B) 10/72.

4/ River Falls Co-op Creamery (2311) 1/50; Hurlbut Company, (4121) 12/55; Pierce Auto Body Works (6635) 2/64; American Motors Corp. (7488) 2/66; Allen Bradley Company (7659) 7/66; Rodman Industries (9650-A) 9/70.

5/ Levi Mews d/b/a Mews Ready Mix Corp. (6683) 3/64 (Aff. 29 Wis. 2d 44) 11/65.

Complainant's second allegation regarding Respondent's failure to pay the contractual wage rate is premised upon his receipt of $6.70 per hour during the period of August 16, 1974 to August 30, 1974. When his hourly rate was lowered to this level the Complainant did contact the Union and, as a result, Complainant's wage rate increased to $8.77 per hour effective August 30, 1974. Complainant did not receive any backpay for the two week period during which he received $6.70 per hour.

There is no evidence that the Union lacked authority to settle the grievance in this fashion or that the Union failed to fulfill its duty to fairly represent the Complainant when pursuing said settlement. Furthermore, there is no evidence that the parties to said settlement regarded the wage adjustment received by the Complainant as anything other than a final resolution of the grievance. Thus, as the Complainant achieved a final settlement of his grievance through the procedures made available by the parties' collective bargaining agreement, the Commission will defer to said settlement and refuse to assert its jurisdiction to reach the merits of this allegation. Therefore, Respondent's motion to dismiss this portion of the complaint is granted although on grounds other than those cited by the Respondent.

The Examiner will not grant Respondent's motion to dismiss that portion of the complaint which alleges discriminatory layoff. Said allegation essentially raises the issue of a non-contractual as opposed to a contractual unfair labor practice and with respect to such allegations, even when arbitration may arguably be available, the Commission has consistently refused to defer to said procedures. Thus the Examiner will proceed to consider the merits of this portion of the complaint.

DISCRIMINATORY LAYOFF

Initially it must be noted that the Complainant has the burden of proving the allegedly discriminatory nature of his layoff. To meet his burden the Complainant must prove by a clear and satisfactory preponderance of the evidence that Respondent had knowledge of Complainant's union activity; that Respondent was hostile toward such activity, and that the layoff was motivated at least in part by anti-union considerations. 6/

The Union activity upon which the Complainant bases his case consists of the Complainant's contact with the Union regarding the Respondent's alleged failure to pay the contractually required wage rate. The record clearly establishes that the Respondent's owner, Harry Viner, was aware that the Complainant had contacted the Union and that said contact was the basis for the wage adjustment granted to the Complainant by Viner's son. Thus the Complainant has established that Respondent had knowledge of Complainant's union activity.

Turning to the issue of Respondent's hostility toward Complainant's union activity, the Examiner finds no direct evidence of such hostility in the record. Circumstantial evidence of potential hostility is raised by the layoff itself and, in order to assess the impact of said evidence, the Examiner finds it necessary to determine whether the layoff was triggered by the decrease in crane usage, as urged by the Respondent,

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6/ St. Joseph Hospital (8787-A, B) 10/69, 12/69; Earl Wetenkamp d/b/a Wetenkamp Transfer and Storage (9781-A, B, C) 3/71, 4/71, 7/71; AC Trucking Company, Inc. (11731-A) 11/73.

or upon the wage adjustment received by the Complainant. While the record does reveal that crane usage had been decreasing to the point of only occasional use, it is also clear that this condition had existed for a substantial period of time prior to the layoff and that its continuation was expected by the Respondent. Faced with this evidence, the timing of the layoff, and Viner's testimony that his anger over the wage adjustment motivated his action, it must be concluded that but for the Complainant's contact with the Union and the resultant wage adjustment, the layoff would not have occurred.

This conclusion raises two competing inferences as to Respondent's possible hostility toward Complainant's union activity and ultimately as to the motivation for the layoff. The first inference created is that Respondent was hostile toward Complainant's contact with the Union and that said hostility led to Complainant's layoff. It is upon this inference that the Complainant basically rests its case, unsupported by any independent evidence. The second inference raised is that the Respondent was not hostile toward Complainant's union activity but rather laid him off because of hostility raised by Complainant's unwillingness to work at a wage rate which both parties had found to be acceptable in the past. This inference is supported by evidence which indicates that during the period of April, 1974 to August, 1974, Complainant had been working at a wage rate below the rate which the contract appears to specify for crane operators. The Complainant also presented testimony indicating that the Complainant had in past years failed to receive overtime payments. This evidence establishes a past wage arrangement between the Complainant and the Respondent which may well have been outside the contractual parameters. The support which this evidence brings to the second inference leads the Examiner to conclude that Respondent's hostility toward the Complainant's violation of this past understanding was the motivating factor in Respondent's layoff decision.

A layoff based upon this type of hostility, as opposed to hostility premised upon an employe's union activity, does not fall within the realm of a statutory violation. While the layoff might raise the issue of a contractual violation, the merits of such a potential issue will not be considered because the Complainant has again failed to exhaust the contractual grievance procedure. Complainant having failed to meet its burden of proof with respect to Respondent's hostility toward Complainant's union contact and said hostilities' role in the layoff, this portion of the complaint must also be dismissed.

Dated at Madison, Wisconsin this 1st day of April, 1976.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Peter G. Davis, Examiner