STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TERRANCE P. CANTWELL and WISCONSIN STATE EMPLOYEES UNION, AFSCME, COUNCIL 24, AFL-CIO, Complainants, vs. STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, Respondent.	Case CVIII No. 21910 PP(S)-47 Decision No. 15716-B

Appearances:
Lawton & Cates, Attorneys at Law, by Mr. Richard V. Graylow, appearing on behalf of the Complainants.
Mr. Robert C. Stone, Attorney at Law, Bureau of Collective Bargaining, Department of Administration, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainants having filed a complaint with the Wisconsin Employment Relations Commission on July 28, 1977 alleging that the above-named Respondent had committed unfair labor practices within the meaning of Section 111.84(1)(a) and (b) of the State Employment Labor Relations Act (SELRA); 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 before the Examiner in Madison, Wisconsin, on October 26, 1977; 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 the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, herein Complainant Union, is a labor organization functioning as the exclusive collective bargaining representative of certain employes of the State of Wisconsin including those individuals classified as Youth Counselor I; and that Terrance P. Cantwell, herein Complainant Cantwell, was employed by the State of Wisconsin as a Youth Counselor I at the Ethan Allen School during August 1976 and thus was at that time a member of a bargaining unit represented by Complainant Union.

2. That the State of Wisconsin, Department of Administration, herein Respondent, is an employer and that during August 1976 Lloyd W. Mixdorf was employed by Respondent as Assistant Superintendent of the Ethan Allen School and functioned as Respondent's agent.

3. That on August 27, 1976 Complainant Cantwell received the following letter:

"Dear Mr. Cantwell:

This is your notification that we are considering terminating you on probation from your position as Youth Counselor I at Ethan Allen School.

The reasons are as follows: Since your employment on June 29, 1976, you have not benefited from the training that has been made available to you by your supervisors and fellow Youth Counselors. You have exhibited a quick temper with the youth and staff, obscene language in giving instructions to the youth, and, as a trainee, resisted the counsel of fellow staff and supervisors.

Should you wish to respond to this letter, an appointment has been made for you at 10 a.m., Monday, August 30, 1976, with Mr. Lloyd Mixdorf and Mr. Marcel Gauthier. If you avail yourself of this opportunity, you may bring representation.

If you do not keep this appointment, we will then consider that you have terminated your position as Youth Counselor I at Ethan Allen School.

Yours very truly,

Roland C. Hershman /s/
Roland C. Hershman
Superintendent";

that Complainant Cantwell informed his union steward, Billy Gallagher, that he had received the August 27, 1976 letter; and that on August 28, 1976 union steward Gallagher called Wayne Wianecki, field representative for Complainant Union and told him that an investigatory hearing regarding Complainant Cantwell's employment status was scheduled for August 30, 1976.

4. That on August 30, 1976 at 10:00 a.m. Complainant Cantwell, Wianecki, and Gallagher appeared at the office of Lloyd W. Mixdorf; that Wianecki informed Mixdorf that he would represent Complainant Cantwell at the meeting; that Complainant Cantwell confirmed that he wanted Wianecki to represent him during the meeting; that Mixdorf informed Wianecki that he would not be allowed to be present during the meeting but that Gallagher, as the local steward, would be allowed to represent Complainant Cantwell; that Mixdorf was acting on the basis of instructions received from Don Foley, Employment Relations Specialist, Department of Health and Social Services, State of Wisconsin; that Complainant Cantwell did not want to attend the meeting unless Wianecki was present; that after further discussion Wianecki, Gallagher and Complainant Cantwell left Mixdorf's office; and that later that morning Complainant Cantwell received the following letter:

"Dear Mr. Cantwell:

This letter is your notification of termination from probationary employment at the Ethan Allen School effective Monday, August 30, 1976.

The reasons are as follows: Since your employment on June 29, 1976, you have not benefited from the training that has been made available to you by your supervisors and fellow Youth Counselors. You have exhibited a quick temper with the youth and staff, obscene language in giving instructions to the youth, and, as a trainee, resisted the counsel of fellow staff and supervisors.

Your failure to meet your 10:00 a.m. appointment on Monday, August 30, 1976, with your representative, Mr. Gallagher, is considered your response to our letter of intention for termination on August 27, 1976.

Yours very truly,

Roland C. Hershman /s/
Roland C. Hershman
Superintendent"

5. That on July 28, 1977 Complainants filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission regarding Complainant Cantwell's dismissal; and that said complaint was signed by Complainants' attorney but was not notarized.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That the Wisconsin Employment Relations Commission will assert its jurisdiction over the merits of Complainants' allegations inasmuch as the July 28, 1977 complaint met all the jurisdictional requirements of Section 111.07(2)(a) of the Wisconsin Statutes and was amended on October 26, 1977 to comply with Wisconsin Administrative Code Section ERB 22.02(1).

2. That Respondent, State of Wisconsin, Department of Administration, by refusing to allow Complainant Terrance P. Cantwell to be represented by the union representative of his own choosing at a meeting regarding the possible termination of his employment status, did not interfere with, restrain or coerce state employes in the exercise of their rights guaranteed by Section 111.82 of SELRA and thus did not commit an unfair labor practice within the meaning of Section 111.84(1)(a) of SELRA.

3. That Respondent State of Wisconsin, Department of Administration, by refusing to allow Complainant Terrance P. Cantwell to be represented by the union representative of his own choosing at a meeting regarding the possible termination of his employment status, did not interfere with the administration of a labor organization and thus did not commit an unfair labor practice within the meaning of Section 111.84(1)(b) of SELRA.

Based upon 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 5th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner

STATE OF WISCONSIN, DEPARTMENT OF ADMINISTRATION, CVIII, Decision No. 15716-B

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

On July 28, 1977 Complainants filed the instant complaint alleging that the Respondent committed unfair labor practices within the meaning of Section 111.84(1)(a) and (b) of SELRA by its August 30, 1976 refusal to allow Complainant Cantwell to attend an "investigatory pre-disciplinary hearing" with a representative of his own choosing. Said complaint was signed by Complainants' attorney. On October 19, 1977 Respondent filed an answer which substantially denied Complainants' allegations and affirmatively alleged that jurisdiction to reach the merits of the complaint did not exist because a valid complaint had not been filed within one year of August 30, 1976. Respondent based said position upon its belief that the complaint filed on July 28, 1977, did not comply with Wis. Admin. Code Section ERB 22.02 inasmuch as it was not "signed and sworn to before any person authorized to administer oaths or acknowledgements" and that any amendment of the complaint to comply with said requirement was barred by the one year statute of limitations set forth in Section 111.07(14), Wisconsin Statutes. The parties argued said motion at the commencement of a hearing on the merits of the instant complaint and at that time the Examiner entered a temporary order denying Respondent's motion to dismiss and granting Complainants' motion to amend the complaint by adding a sworn certification. The Examiner further indicated that Respondent was free to re-argue said motion in its brief and that the instant decision would then represent the Examiner's final response to said motion. Inasmuch as Respondent pursued its motion to dismiss in its brief, the undersigned now proceeds to consider and resolve said issue.

It should initially be noted that there is no statutory requirement that a complaint alleging violation of the State Employment Labor Relations Act be "sworn to before any person authorized to administer oaths or acknowledgements." 1/ Inasmuch as the July 28, 1977 complaint met all the jurisdictional requirements of Section 111.07(2)(a) and was filed less than one year from the date of the alleged statutory violation, it is concluded that the filing of said complaint was sufficient to toll the statute of limitations. Furthermore, while Wis. Admin. Code Section ERB 22.02(1) does require that a complaint be verified in the above-quoted manner, and the July 28, 1977 complaint did not meet this procedural requirement, ERB 22.02(5)(a) allows for the amendment of a complaint prior to or during the hearing. In the instant situation where Complainants amended their complaint prior to the hearing to bring it into compliance with ERB 22.02(1) and Respondent made no showing that it was in any way prejudiced by the original complaint's non-compliance with ERB 22.02(1), the Examiner concludes that Respondent's motion to dismiss must be denied.

Turning to the merits of the instant complaint, it is clear that on August 27 Complainant Cantwell was notified by letter that Respondent was considering "terminating you on probation from your position. . . ."; that if he wanted to "respond to this letter" an appointment had been made on August 30 with Mixdorf; that if he wanted to attend said meeting he could "bring representation"; and that "if you do not keep this appointment, we will then consider that you have terminated your position. . . ." It is also clear that on August 30, 1976 Complainant Cantwell appeared at Mixdorf's office with his local union steward and a field representative of Complainant Union; that Mixdorf

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1/ See Section 111.84(4) and Section 111.07(2)(a), Wis. Stats.

refused to meet with Complainant Cantwell if he insisted upon the field representative being present but that Mixdorf was willing to meet with Complainant Cantwell and the union steward; that Complainant Cantwell was unwilling to meet with Mixdorf unless the field representative was present; that as a result no meeting was held; and that Complainant Cantwell was then terminated. Complainants allege that Complainant Cantwell had an absolute statutory right to be represented by a representative of his own choosing at the meeting with Mixdorf and that Respondent's refusal to allow Cantwell to be represented by Wianecki thus interfered with Cantwell's rights under Section 111.82 of SELRA and also interfered with the administration of a labor organization in violation of Section 111.84(1)(b) of SELRA.

In Waukesha County (14662-B) 3/78, the Commission was confronted with a situation quite similar to that presented by the instant case. A discharged probationary employe sought a meeting with the employer in the hope that the discharge might be rescinded. The employe had no contractual, constitutional, or statutory right to such a meeting. The employer ultimately agreed to meet with the employe and to allow the employe to bring a witness. However both agreements were conditioned upon the absence from the meeting of any union official. When the employe arrived at the meeting with representatives of the union, the employer indicated that there would be no meeting if the employe insisted upon being accompanied by a union official. The employe ultimately complied with the employer's condition, the meeting took place, and the employer did not reinstate the employe. The employe's union subsequently asserted that the employer's denial of the employe's request to be represented by a union official violated the employe's rights to representation at such a meeting under Section 111.70(2) of the Municipal Employment Relations Act. The Commission concluded that even if a right to representation existed, the employer avoided interference, restraint or coercion of the employe in the exercise of such a right when it indicated an intent not to conduct the meeting if the employe insisted upon being represented by the union. The conclusion was premised upon the fact that the employer did not compel the employe to attend a meeting and permitted the employe to choose between foregoing the advantages of a meeting to which the employe is not otherwise entitled and enduring the disadvantages of meeting without union representation. The Commission determined that a finding of no violation in said situation best balanced the employe's interest in just treatment and the employer's interest in efficient and orderly operations. In reaching this conclusion, the Commission relied heavily upon the analysis of the United States Supreme Court in NLRB v. Weingarten, Inc. 420 U.S. 251, 88 LRRM 2689 (1975) inasmuch as the language used to express employe rights under Section 7 of the National Labor Relations Act closely parallels that used by the Wisconsin Legislature in Section 111.70(2) of the Municipal Employment Relations Act (MERA).

The factual parallels between Waukesha County and the instant case are striking. There is no assertion that Complainant Cantwell had any contractual, constitutional, or statutory right to a meeting and the record does not provide a basis for concluding that such a right existed. Complainant Cantwell was not compelled to attend the meeting with Mixdorf. Mixdorf allowed Complainant Cantwell to choose between foregoing the advantages of a meeting and enduring the disadvantages of a meeting without the union representation of his own choosing, as opposed to a complete lack of union representation as in Waukesha County. While the Waukesha County decision involved municipal employe rights under Section 111.70 of MERA and the instant case turns upon state employe rights under Section 111.82 and 111.84 of SELRA, the statutory expressions of employe rights under Section 111.70(2) of MERA and Section 111.82 of SELRA are virtually the same. Thus it is concluded that the Commission's determination with respect to employes' rights to representation under MERA can reasonably be extended to the case at hand. Inasmuch as the Commission concluded in

Waukesha County that no interference occurred under MERA where the employer gave the employe the choice between a meeting without any union representation and no meeting at all, the undersigned concludes that even if a right to representation existed, Respondent's giving Complainant Cantwell a choice between a meeting without the union representative of his own choosing and no meeting at all requires a finding of no interference under SELRA.

Having reached this conclusion under the foregoing analysis, the Examiner has no basis for finding that the Respondent interfered with the administration of a labor organization by refusing to allow Wianecki to participate in a meeting.

Dated at Madison, Wisconsin this 5th day of April, 1978.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Peter G. Davis, Examiner