

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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TERRY FRANK,	:	
	:	
Complainant,	:	
	:	Case CXC
vs.	:	No. 31647 PP(S)-97
	:	Decision No. 20830-A
STATE OF WISCONSIN,	:	
(DEPARTMENT OF HEALTH AND	:	
SOCIAL SERVICES),	:	
	:	
Respondent.	:	
	:	

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Appearances:

Brynelson, Herrick, Gehl & Bucaida, Attorneys at Law, by Mr. Steven J. Schooler, P. O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the Complainant.

Mr. Edward A. Corcoran and Mr. Thomas E. Kwiatkowski, Attorneys at Law, Department of Employment Relations, Division of Collective Bargaining, 149 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707, appearing on behalf of Respondent State.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The above-named Complainant having filed a complaint with the Wisconsin Employment Relations Commission alleging that the above-named Respondent has committed unfair labor practices within the meaning of the State Employment Labor Relations Act (SELRA); and the Commission having appointed Mary Jo Schiavoni, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order as provided in Section 111.07(5), Wis. Stats.; and a hearing on said complaint having been held in Madison, Wisconsin, on August 10, 1983, before the Examiner; and the parties having completed their briefing schedule by October 14, 1983; and the Examiner, having considered the evidence and arguments and being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Terry Frank, hereinafter referred to as the Complainant or Frank, was employed by the State of Wisconsin as an Institutional Aide at the Central Wisconsin Center (CWC) for the Developmentally Disabled from October 24, 1977 until her termination on April 18, 1980.

2. That the State of Wisconsin, hereinafter referred to as the State or Respondent State, is an employer employing various employes in the performance of its various functions; that various classifications of its employes are included in various appropriate collective bargaining units, and are represented by various labor organizations for purposes of collective bargaining pursuant to the State Employment Labor Relations Act; and that in performing the latter function, the State is represented by its Department of Employment Relations, which has its offices at 149 East Wilson Street, Madison, Wisconsin 53702.

3. That, at all times material herein, the State has recognized the Wisconsin State Employees Union, AFSCME, Council 24, AFL-CIO, hereinafter referred to as WSEU, as the exclusive bargaining representative for certain of its employes including the Complainant herein.

4. That the State and the WSEU have been, and are, parties to collective bargaining agreements covering wages, hours and working conditions of employes in the bargaining unit of which Frank is a member; that these agreements, by their terms, were effective from November 9, 1979 to June 30, 1981, and from December 20, 1981 to June 30, 1983; that said agreements both contained, among

their provisions, a grievance and arbitration provision providing for the final and binding arbitration of grievances relating to alleged violations of said agreement as well as the following provisions material herein:

Article 4, Section 9(A). The parties recognize the authority of the Employer to suspend, demote, discharge, or take other appropriate disciplinary action against employees for just cause . . . .

Article 4, Section 9(E). If any discipline is taken against an employee, both the employee and the Union will receive copies of this disciplinary action.

Article 13, Section 8, Part 6(A). The Employer agrees to provide the following rights upon his/her return from any of the approved leaves without pay.

(1) The employee shall have the right to be returned to his/her position or one of like nature.

5. That Frank suffered a job-related injury on April 29, 1979, and was on paid leave status until August 31, 1979; that she continued on unpaid leave from that date until April 18, 1980; that on or about April 18, 1980, the State, by its agent, Brian Fancher, mailed Frank a letter advising her that her employment would be terminated on April 18, 1980, and further advising her that she retained reinstatement eligibility for three years from the date of termination; that Frank did not receive a copy of this letter at that time but did receive a copy of the letter two weeks prior to the arbitration hearing which was held on October 26, 1982.

6. That Frank applied for reinstatement in June and August of 1980, in February of 1981, and in April of 1983; and that her requests for reinstatement were denied.

7. That Frank knew or should have known that her employment was terminated by April of 1981 at the latest because Fancher, in the summer or fall of 1980, had explained to Frank in telephone conversations that she was in fact terminated, because she withdrew vested benefits from her retirement account in October of 1980, such withdrawal only being possible after severance of employment, and because she had received a letter in April of 1981 unequivocally informing her that her request for reinstatement had been denied and would not be considered further.

8. That WSEU filed a grievance at the third step of the parties' grievance procedure as a "Union grievance" which stated in relevant part: "This grievance is being filed to protect contract rights. This involves Terry Frank's letter from Brian Fancher dated April 3, 1981"; that said grievance was processed through arbitration; that Arbitrator George Fleischli issued an arbitration award on November 24, 1982, in which he held the grievance relating to Frank's discharge to be untimely and refused to consider the grievance on its merits; that said award further stated, in pertinent part, as follows: ". . . the letter (of April 3, 1981) dealt with a denial of reinstatement to Frank who had previously been terminated for reasons which were, in the Employer's view 'without any delinquency or misconduct' within the meaning of Section 230.31(1) of the Wisconsin Statutes. The Employer has consistently taken the position that such a denial is not arbitrable under the provisions of the agreement and the Union disclaims any intent to arbitrate that question in this case"; and that the grievance was denied for lack of arbitrability.

9. That Complainant filed the instant complaint on May 26, 1983, alleging a violation of Section 111.84(1)(e).

#### CONCLUSIONS OF LAW

1. That the Examiner will not assert the Commission's jurisdiction to determine the merits of the alleged Section 111.84(1)(e) violation in an unfair labor practice proceeding since said contractual issue was submitted to final and binding arbitration pursuant to the collective bargaining agreement of Respondent State and the WSEU and since a final and binding award was issued with respect to Complainant's termination which is not repugnant to the rights of the parties or

Complainant under SELRA; and that, accordingly, the Examiner deems the decision of Arbitrator George Fleischli, which issued on November 24, 1982, to be dispositive of all issues with respect to Complainant's termination.

2. That the Wisconsin Employment Relations Commission does not possess subject matter jurisdiction over any claims for reinstatement which are independent of the act of termination by Respondent State.

ORDER 1/

IT IS ORDERED that the complaint filed in the above-entitled matter be, and hereby is, dismissed; and that the award of costs requested by Respondent State is hereby denied.

Dated at Madison, Wisconsin this 19th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni  
Mary Jo Schiavoni, Examiner

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1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

MEMORANDUM ACCOMPANYING  
FINDINGS OF FACT, CONCLUSIONS OF LAW  
AND ORDER

Introduction:

In her complaint filed May 26, 1983, Complainant Frank alleges that Respondent State, by terminating and refusing to reinstate her, has violated and continues to violate a collective bargaining agreement between WSEU and Respondent State and thereby violated Section 111.84(1)(e) of the Wisconsin Statutes. The State, by an answer and motion to dismiss, claims that the WERC lacks subject matter jurisdiction to consider the allegations in the complaint. A hearing was held in this matter on August 10, 1983. The hearing was limited to evidence and argument on the jurisdiction of the Commission to entertain the complaint. The State at the hearing also moved to join the WSEU as a necessary party and the Examiner reserved her ruling on this motion.

Positions of the Parties:

The State asserts a number of grounds for its contention that the WERC does not have jurisdiction to consider an unfair labor practice complaint challenging Frank's termination as without just cause in violation of Section 111.84(1)(e), Wis. Stats. It claims that Complainant failed to exhaust the final and binding grievance/arbitration procedures of the collective bargaining agreement and that she failed to demonstrate that resort to the grievance/arbitration procedure would have been "futile".

According to the State, the complaint in this matter was filed beyond the one-year statute of limitations set forth in Section 111.07(14), Wis. Stats. It claims the specific act in controversy, namely Complainant's termination, occurred in April of 1980 and that Complainant was aware of said termination by April of 1981 at the latest; yet she failed to file a complaint until May 26, 1983.

As an additional defense, the State alleges that an arbitration award issued by Arbitrator George Fleischli on November 24, 1982, is res judicata with respect to the issues regarding any alleged violations of the collective bargaining agreement.

With respect to any claims of reinstatement rights independent of the act of termination, the State stresses that the WERC is without subject matter jurisdiction because such claims fall within the administrative purview of the Personnel Commission.

The State then argues that, assuming the WERC does possess jurisdiction, the WSEU and its Local No. 634 are necessary parties to the proceeding.

Complainant, on the other hand, asserts that the WERC does have jurisdiction over both Complainant's termination and the denials of her request for reinstatement because the State's actions, specifically its April 18, 1980 letter and subsequent refusals to reinstate her, constitute a violation of her rights to continued employment terminable only for just cause pursuant to the collective bargaining agreement. It stresses that by attempting to split the act of discharge into two parts, the State should not be permitted to do so without just cause.

Complainant argues that she was never properly notified in writing of the change in her employment status and that the State has actively misled her as to her status by acknowledging that she did have rights to reinstatement. Misleading and fraudulent actions, according to Complainant, bar the assertion of a statute of limitations as a defense. Moreover, Complainant avers that the statute of limitations does not apply because her final reinstatement application was made on April 14, 1983, within the one year period. This denial of the final application was the final action unequivocally terminating Complainant's employment relationship with the State.

Maintaining that the decision to assert the Commission's jurisdiction is discretionary, Complainant argues that jurisdiction should be asserted where, as here, the State refuses to renounce technical objections which would prevent a

decision on the merits in an arbitration. Complainant also claims that any attempt to exhaust the grievance procedure would be futile inasmuch as an arbitrator will most likely hold a grievance filed in April of 1980 or October of 1982 to be untimely and, with respect to the denial of reinstatement, not arbitrable.

The Complainant makes no claim that the WSEU failed to fairly represent her before Arbitrator Fleischli nor does she contend that the case is an appeal of the November 24, 1982 arbitration award. Rather, she claims that she was not a party or even a witness in the previous matter and argues that the issues in the present case differ from those before the Examiner. According to Complainant, the focus of the present case is that the denial of reinstatement is the second part of a single act which effectively terminated her without just cause. Since this issue was not before the Arbitrator and Complainant was never a party, Frank argues that Fleischli's decision is not dispositive of the present case.

Complainant asserts that the WERC has jurisdiction over this matter irrespective of any jurisdiction which the Personnel Commission may possess and requests that the Respondent State's motion to dismiss be denied.

#### Discussion:

The State claims that the Commission is without jurisdiction because more than one year elapsed from the State's termination of Frank and the filing of the complaint herein. The Commission has, however, held that where a collective bargaining agreement provides for final and binding disposition of disputes arising thereunder, it will not entertain a complaint on the merits that either party has violated said agreement before the parties have exhausted the procedure for resolving disputes. 2/ In effectuating this policy, it has consistently held that a cause of action does not arise until the grievance procedure has been exhausted and the one-year period of limitation for the filing of the complaint in such cases is computed from the date when the grievance procedure was exhausted, provided the Complainant has not unduly delayed the grievance procedure. 3/ The rationale behind this policy is that parties should be allowed to utilize the dispute resolution mechanism for which they bargained when recourse to that forum will also resolve the prohibited practice question before the Commission. 4/ Accordingly, said complaint is not barred by the one-year statute of limitations provided for in Section 111.07(14), Wis. Stats., because the exhaustion of the dispute resolution mechanism occurred on November 24, 1982, when Arbitrator Fleischli issued an arbitration award. The complaint was filed on May 26, 1983, within the one year statute of limitations, and is timely filed for purposes of consideration by the Commission.

Respondent also points to the November 24, 1982 arbitration award and argues that the instant dispute is res judicata. As noted above, in cases involving Section 111.70(3)(a)5 allegations, the Commission will not assert its jurisdiction where the parties to an agreement have agreed to arbitrate the dispute over alleged contractual violations. 5/ The reason for deferral is apparent in these cases; namely, the substantial congruity of issues presented to the arbitrator and the Commission for resolution and the interest in judicial economy. Where, as here, there is no question that the proceedings before the arbitrator were fair and regular and the parties agreed that the award was to be final and binding, Commission deferral to the award is appropriate. Absent a showing that the award is repugnant to the purposes of SELRA, or a showing that the proceedings were not fair or regular, deferral in this case is appropriate. Even where, as here, the arbitrator did not render an award on the merits, but rather decided on procedural

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- 2/ Harley-Davidson Motor Co., (7166) 6/65; Appleton Memorial Hospital, (14964) 11/71; Prairie Farm Joint School District No. 5, (12740-A,B) 6/75; Plum City Joint School District, (15626-A) 4/78.
  - 3/ Prairie Farms Joint School District No. 5, supra;; Plum City Joint School District, supra;; and City of Madison, (15725-A, B) 6/79.
  - 4/ City of Madison, supra.
  - 5/ Jt. School District of Madison, et al. No. 8, (14866, 14867) 8/76; Milwaukee Sewerage Commission, (15755-A) 2/78.

grounds, the Commission has held that as long as the above conditions are met, it is appropriate to defer to the arbitrator's award. 6/ Not to defer to the award and allow relitigation by parties who were obviously dissatisfied with the arbitrator's award would grant an unreasonable second bite at the apple which would seriously undermine the strong Commission policy favoring the finality of arbitration awards. 7/

Complainant argues that she was not a party to the arbitration nor did she appear as a witness, thus she should not be bound by the award. 8/ She has, however, conceded that there is no evidence to suggest nor does she claim that WSEU failed to fairly represent her in this matter. In view of the fact that Complainant makes no pretense of seeking review of the November 24, 1982 award and does not allege that the WSEU failed to fairly represent her with respect to her termination and reinstatement claims, but relies exclusively on a breach of contract theory, the Examiner declines to assert the Commission's jurisdiction for to permit Complainant to collaterally attack the award, absent allegations of unfair representation by the WSEU, would grant to the Complainant two bites at the apple and undermine the policy previously established by the Commission. 9/

The Respondent State and WSEU did not litigate any issues with respect to the State's failure to reinstate Complainant at the October 26, 1982 arbitration hearing, nor did Arbitrator Fleischli expressly rule on any independent right which Complainant might possess with respect to reinstatement. It appears from the award that both parties took the position that denials of reinstatement were not arbitrable, or at least not properly before Arbitrator Fleischli.

The Examiner, in finding that the arbitration award is conclusive with respect to Complainant's termination, expressly does not rule on any reinstatement rights to which she may be entitled independent from her termination. Rather, she concludes that the Commission does not possess subject matter jurisdiction over said reinstatement rights, those rights being within the purview of the Personnel Commission.

This matter is, accordingly, dismissed in its entirety. 10/

Respondent requests costs from Complainant. The general policy of the Commission is that it will only grant attorneys fees and costs pursuant to a statutory or contractual provision for such an award or in cases where employes have been denied fair representation by a union. 11/ Respondent's request for costs does not fall within any of the above criteria and is, therefore, denied.

Dated at Madison, Wisconsin this 19th day of December, 1983.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Mary Jo Schiavoni  
Mary Jo Schiavoni, Examiner

6/ Milwaukee Sewerage Commission, supra.

7/ Ibid.

8/ Complainant's argument that the State fraudulently sought to terminate her and misled her as to her reinstatement rights could have been raised at the arbitration hearing had Complainant attended or by the WSEU as her bargaining representative. Moreover, Complainant offers no explanation as to any mitigating reasons for her failure to participate in said hearing which would warrant a contrary conclusion.

9/ Frank's argument that the denial of her subsequent requests for reinstatement creates a totally different issue which was not considered by the Arbitrator is rejected.

10/ In view of my findings in this matter, it is unnecessary to rule on Respondent State's motion to join WSEU as an essential party.

11/ Madison Schools, 16471-D (5/81, aff'd in part, rev'd in part sub nom, Madison Teachers Incorporated et al. v. WERC, et al., Wis. 2d \_\_\_\_\_ (Ct. App. IV, No. 82-579, 10/25/83).