

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS L. SCHROEDER,

Complainant,

vs.

STATE OF WISCONSIN, DEPARTMENT
OF EMPLOYMENT RELATIONS,

Respondent.

Case 191
No. 31650 PP(S)-98
Decision No. 20909-B

Appearances:

Mr. Thomas L. Schroeder, Complainant, 341 East First Street, Fond du Lac, Wisconsin 54935, appearing on his own behalf.

Mr. Sanford N. Cogas and Mr. Duane McCrary, Attorneys at Law, Department of Employment Relations, State of Wisconsin, 149 East Wilson Street, P. O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent.

FINDINGS OF FACT, CONCLUSION OF LAW AND
ORDER AFFIRMING EXAMINER'S ORDER
GRANTING MOTION TO DISMISS

Examiner Daniel L. Bernstone having on March 7, 1985, issued an Order Granting Motion to Dismiss, wherein he dismissed an unfair labor practice complaint filed by Thomas L. Schroeder on May 31, 1983, against the State of Wisconsin because said complaint was filed with the Commission more than one year from the date of the unfair labor practice alleged therein; and Schroeder having on March 27, 1985 filed a document with the Commission which he subsequently asserted was intended to be a petition seeking Commission review of Examiner Bernstone's decision; and the parties thereafter having filed written argument the last of which was received on May 13, 1985; and the Commission having considered the Examiner's decision, the record before the Examiner, and the parties written argument and being satisfied that the Examiner's Order should be affirmed but that formal Findings of Fact and Conclusion of Law should be made upon which an Order could then be premised:

NOW, THEREFORE, it is

ORDERED 1/

A. That the following Findings of Fact are hereby made and issued as the Commission's:

1. That Thomas L. Schroeder, herein Complainant or Schroeder, was at certain pertinent times an employe within the meaning of Sec. 111.81(7), Stats., and currently resides at 341 East First Street, Fond du Lac, Wisconsin 54935.

2. That the State of Wisconsin, herein the Respondent, is an employer within the meaning of Sec. 111.81(8), Stats., having offices at 149 East Wilson Street, Madison, Wisconsin 53707.

3. That on or about October 4, 1979, Complainant received the following letter of termination from Respondent:

This letter is to inform you that your employment as the Facility Repair Worker 1 at the Wisconsin Rapids National Guard Armory is terminated effective 5 October 1979.

1/ See Footnote 1 on Page 2

- 1/ Pursuant to Sec. 227.11(2), Stats., the Commission hereby notifies the parties that a petition for rehearing may be filed with the Commission by following the procedures set forth in Sec. 227.12(1) and that a petition for judicial review naming the Commission as Respondent, may be filed by following the procedures set forth in Sec. 227.16(1)(a), Stats.

227.12 Petitions for rehearing in contested cases. (1) A petition for rehearing shall not be prerequisite for appeal or review. Any person aggrieved by a final order may, within 20 days after service of the order, file a written petition for rehearing which shall specify in detail the grounds for the relief sought and supporting authorities. An agency may order a rehearing on its own motion within 20 days after service of a final order. This subsection does not apply to s. 17.025 (3)(e). No agency is required to conduct more than one rehearing based on a petition for rehearing filed under this subsection in any contested case.

227.16 Parties and proceedings for review. (1) Except as otherwise specifically provided by law, any person aggrieved by a decision specified in s. 227.15 shall be entitled to judicial review thereof as provided in this chapter.

(a) Proceedings for review shall be instituted by serving a petition therefor personally or by certified mail upon the agency or one of its officials, and filing the petition in the office of the clerk of the circuit court for the county where the judicial review proceedings are to be held. Unless a rehearing is requested under s. 227.12, petitions for review under this paragraph shall be served and filed within 30 days after the service of the decision of the agency upon all parties under s. 227.11. If a rehearing is requested under s. 227.12, any party desiring judicial review shall serve and file a petition for review within 30 days after service of the order finally disposing of the application for rehearing, or within 30 days after the final disposition by operation of law of any such application for rehearing. The 30-day period for serving and filing a petition under this paragraph commences on the day after personal service or mailing of the decision by the agency. If the petitioner is a resident, the proceedings shall be held in the circuit court for the county where the petitioner resides, except that if the petitioner is an agency, the proceedings shall be in the circuit court for the county where the respondent resides and except as provided in ss. 182.70(6) and 182.71(5)(g). The proceedings shall be in the circuit court for Dane county if the petitioner is a nonresident. If all parties stipulate and the court to which the parties desire to transfer the proceedings agrees, the proceedings may be held in the county designated by the parties. If 2 or more petitions for review of the same decision are filed in different counties, the circuit judge for the county in which a petition for review of the decision was first filed shall determine the venue for judicial review of the decision, and shall order transfer or consolidation where appropriate.

(b) The petition shall state the nature of the petitioner's interest, the facts showing that petitioner is a person aggrieved by the decision, and the grounds specified in s. 227.20 upon which petitioner contends that the decision should be reversed or modified.

. . .

(c) Copies of the petition shall be served, personally or by certified mail, or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon all parties who appeared before the agency in the proceeding in which the order sought to be reviewed was made.

Note: For purposes of the above-noted statutory time-limits, the date of Commission service of this decision is the date it is placed in the mail (in this case the date appearing immediately above the signatures); the date of filing of a rehearing petition is the date of actual receipt by the Commission; and the service date of a judicial review petition is the date of actual receipt by the Court and placement in the mail to the Commission.

You failed to report to work or furnish medical certification for being absent from work on 17 September 1979, and you did not report to work or notify your supervisor that you would not be in on 21 September 1979. This is in violation of the direct order given you in the letter of suspension dated 12 September 1979.

You were also absent from work on the following dates under the conditions indicated:

24 September 1979 - 2 hours without approval or notification to your supervisor.

25 September 1979 - All day without approval or notification to your supervisor.

26 September 1979 - All day. Someone called in stating you were sick. The individual was advised that you would be required to produce a medical excuse from your physician before sick leave would be approved. The medical excuse was not provided.

27 September 1979 - Afternoon (4 hours). You were advised by Mr. Yeazel at the investigating interview on that date to see your doctor if you were not feeling well and to bring a medical certification or report back to work. You did neither.

28 September 1979 - All day without approval or notification to your supervisor.

1 & 2 October 1979 - All day on both days without approval or notification to your supervisor.

Failure to comply with the requirement of reporting to work, notifying your supervisor and/or submitting medical certification when required by your supervisor violates the requirements listed in the Wisconsin Rapids Armory Maintenance and Facility Standard Operating Procedures (SOP), which you have a copy of, and which is also listed in the letter of reprimand to you from your supervisor dated 10 April 1979.

Because of the excessive unexcused absences even after prior warnings, your insubordination by failure to follow direct orders in reporting to work or to provide medical certification, and the disrespectful attitude displayed by your comments on the returned letter of supervision, this department is left with no other alternative but to terminate your employment.

Your classification is included in the Blue Collar unit covered by the collective bargaining agreement between the State of Wisconsin and AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO, and, accordingly, if you allege that this action was not based on just cause, you may appeal through the contractual grievance procedure.

4. That on May 31, 1983, Complainant filed the following unfair labor practice complaint with the Commission:

1. Name and address of the Complainant

Thomas L. Schroeder
341 East 1st Street
Fond du Lac, Wisconsin 54935

2. Name and address of Respondent

State of Wisconsin
Department of Employment Affairs
149 East Wilson Street
Madison, Wisconsin 53702

3. The Complainant alleges that the Respondent has engaged in prohibited practices within the meaning of Section 111.84, Wis. Stats.

1. I was employed by the State of Wisconsin (Department of Military Affairs) at the National Guard Armory in Wisconsin Rapids from July 12, 1976 until October 5, 1979 as a Facilities Repair Worker 1.

2. During the course of my employment, my supervisor Mr. George Peterson committed the following unfair labor practice:

A. Failed to report to the appointed authority an injury which was job related in violation of Article XIII, Section 18 of the Collective Bargaining Agreement (1977 - 1979) and in violation of Section 111.84 (1) (e).

3. Upon my return to work at the National Guard Armory in January of 1979, following open heart surgery, Mr. Peterson, for reasons never made known to me, determined to terminate my employment. During the following several months Mr. Peterson was extremely critical of my job performance on virtually every occasion that we come into contact, although he never indicated to me in exactly what way he felt my job performance was unsatisfactory. In June of 1979 I received my annual evaluation report which was far below any I had previously received even though the quality of my work had not changed since my last evaluation.

4. In April of 1979 Mr. Peterson along with Mr. Wianecki, field representative (sic) of the WSEU, stated to me that my job performance was suffering because of my mental condition.

5. Mr. Peterson recognized a condition which he believed was troublesome to him. He brought the matter to the attention of Mr. Wianecki of the WSEU but failed to treat it as a job related injury and to report it to the appointed authority. Instead he sought to have me terminated. This is in violation of Section 111.82, therefore my termination was without just cause.

WHEREFORE, the complaint asks for relief as follows:

A. Reinstate as a state employee.

B. Lost wages from the day of my termination from state employment through the date a decision is reached in this matter.

C. From the date a decision is reached in this matter, an amount not less than the net monthly pay I was receiving at the time of my termination, such

amount to be paid until such time as I have obtained employment at a rate no less than I was receiving immediately prior to my termination.

D. Punitive damages in the amount of \$100,000.00.

E. The cost and disbursements of this action including reasonable attorney's fees.

F. Such other and further relief as may be equitable.

5. That Complainant's May 31, 1983 unfair labor practice complaint was filed with the Commission more than one year from the date of the unfair labor practice alleged therein.

B. Based upon the above and foregoing Findings of Fact, the Commission makes and issues the following

CONCLUSION OF LAW

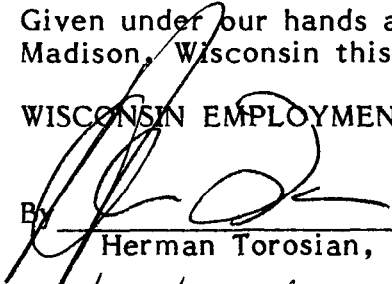
1. Because the unfair labor practice complaint filed by Thomas L. Schroeder against the State of Wisconsin was filed with the Commission more than one year after the occurrence of the unfair labor practices alleged therein to have been committed by the State of Wisconsin, under Secs. 111.07(14) and 111.84(4), Stats., Schroeder lacks a right to proceed under Sec. 111.84(1), Stats., to receive a decision on the merits of that complaint.

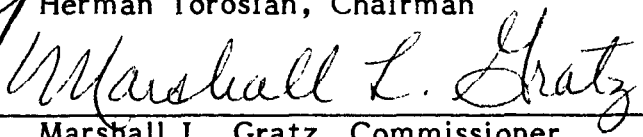
C. Based upon the above and foregoing Findings of Fact and Conclusion of Law, the Commission hereby affirms the Examiner's order dismissing the complaint filed by Thomas L. Schroeder.

Given under our hands and seal at the City of
Madison, Wisconsin this 19th day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSION OF LAW AND ORDER AFFIRMING
EXAMINER'S ORDER GRANTING MOTION TO DISMISS

BACKGROUND

Complainant Schroeder alleges in his complaint that Respondent State of Wisconsin violated Sec. 111.84, Stats., by failing to properly report a job related injury and ultimately by discharging him without just cause. Schroeder's discharge on or about October 5, 1979 is the most recent event specified in the complaint. Examiner Bernstone dismissed Schroeder's complaint concluding that it was filed more than three and one-half years after the occurrence of the alleged unfair labor practices and thus was untimely under Secs. 111.07(14) and 111.84(4), Stats.

On the last day of the twenty day time period established by Sec. 111.07(5) and 111.84(4), Stats., for receipt of petitions for review of Examiner decisions, the Commission received a document from Schroeder which consisted of a clipping from an unknown publication the text of which read:

Public employees are entitled to hearings before being fired, the Supreme Court holds. It says two Ohio civil servants should have had predissmissal hearings as an initial check on whether charges against them were true and the firings reasonable.

Below the clipping was the following message:

Very interesting! But then here in good ol Progressive Wisconsin firings are never anything but reasonable so so why waste time with a prehearing, right?

T. Schroeder
Case 191 No. 31650 PP (S) - 98

In response to Commission inquiries regarding whether Schroeder intended the above quoted document to be a petition for review, Schroeder stated the following in separate letters received by the Commission on April 3 and April 8, 1985 respectively:

To me the matter in question has been the source of much pain and frustration. At every turn my attempts to obtain even minimal justice have been thwarted, leaving me with the impression that to some observing all of the legal niceties and strict attention to form the ritual are far more important than getting at the simple truth.

The information sent to the Commission, perhaps in frustration, may be regarded as a petition if it meets the requirements of such.

Thank you for your letter. It was never my intent to equivocate, having only a layman's understanding of law I was uncertain as to how to proceed in the drafting a petition in acceptable form.

Now after reviewing ERB 22.9 I ask the Commission to review the decision of the Examiner, taking into consideration paragraphs (b) and (c).

POSITIONS OF THE PARTIES

In written argument received by the Commission after the above quoted letters, the State argued:

1. That Schroeder's petition for review should be dismissed because it was untimely filed and did not comply with the Commission's rules regarding the content and service of petitions for review.
2. That if the Commission elects to entertain the petition, Examiner Bernstone's decision should be upheld given the untimely filing of Schroeder's complaint and his failure to exhaust the procedure available to him under the collective bargaining agreement between AFSCME, Council 24 and the State for adjudicating alleged violations of contract.

Schroeder responded to the State's arguments by asserting that technicalities imposed by State statutes and administrative rules should not prevent the Commission from following the mandates of the United States Supreme Court under Cleveland Board of Education v. Loudermill, 118 LRRM 3041, _____ U.S. _____ (1985). Asserting that he was denied the pre-termination hearing which the United States Supreme Court concludes must be held to insure that justice is done, Schroeder urges the Commission to uphold the Wisconsin tradition of leadership in the field of social reform by reversing the Examiner's decision.

DISCUSSION

Section 111.07(5), Stats., which is made applicable to unfair labor practice proceedings under the State Employment Labor Relations Act by Sec. 111.84(4), Stats., provides that a party who is "dissatisfied" with an Examiner decision "may file a written petition with the Commission as a body . . ." within twenty days of the date a copy of the decision was mailed to the party. Commission Rule ERB 22.09 Wis. Adm. Code contains certain requirements regarding the content of a petition for review and service of same upon other parties. 2/

ERB 12.09 imposes precisely the same requirements upon petitions for review filed in cases under the Municipal Employment Relations Act.

-
- 2/ ERB 22.09 Review of findings of fact, conclusions of law and order issued by single member or examiner. (1) RIGHT TO FILE: TIME. Within 20 days from the date that a copy of the findings of fact, conclusions of law and order of the single member or examiner was mailed to the last known address of the parties in interest, any party in interest, who is dissatisfied with such findings of fact, conclusions of law and order, may file a written petition with the commission, and at the same time cause copies thereof to be served upon the other parties, to review such findings of fact, conclusions of law or order. 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 of fact, conclusions of law or order, it may extend time another 20 days for filing the petition for review.

(2) PETITION FOR REVIEW: BASIS FOR AND CONTENTS OF. The petition for review shall briefly state the grounds of dissatisfaction with the findings of fact, conclusions of law and order, and such review may be requested on the following grounds:

(a) That any finding of material fact is clearly erroneous as established by the clear and satisfactory preponderance of the evidence and prejudicially affects the rights of the petitioner, designating all relevant portions of the record.

(b) That a substantial question of law or administrative policy is raised by any necessary legal conclusions in such order.

(c) That the conduct of the hearing or the preparation of the findings, conclusions of law, or order involved a prejudicial procedural error, specifying in detail the nature thereof and designated portions of the record, if appropriate.

The Commission has historically been quite liberal when applying the provisions of ERB 12.09 to insure that dissatisfied litigants can obtain Commission review of Examiner decisions. See e.g., Weyauwega Jt. School District, Dec. No. 14373-C (WERC, 7/77); Waunakee Jt. School District, Dec. No. 14749-B (WERC 2/78); CESA #4, Dec. No. 13100-G (WERC 5/78). We see no reason to be any less liberal under ERB 22.09. However, it can quite reasonably be argued that even under the most liberal application of ERB 22.09 to the document timely filed by Schroeder, serious doubts exist as to whether said document constitutes a petition for review.

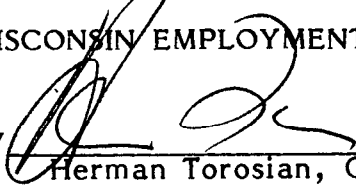
Assuming arguendo that we have a valid petition before us, our review of the instant matter persuades us that the Examiner properly dismissed Schroeder's complaint as having been filed more than one year after the unfair labor practices alleged therein. We have herein made the formal Findings of Fact and Conclusion of Law which support the Order dismissing the complaint. In our view, it is clear that the last event or unfair labor practice complained of by Schroeder in his complaint occurred in October 1979 and thus Sec. 111.07(14), and 111.84(4), Stats., mandate dismissal of Schroeder's complaint filed on May 31, 1983. 3/

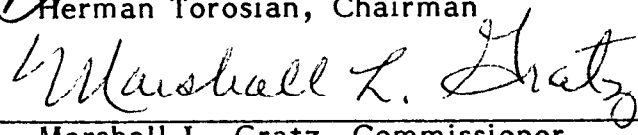
Having found that the statute of limitations bars our consideration of the merits of Schroeder's complaint, we need not and do not address the Loudermill case to which Schroeder's March 27 clipping refers.

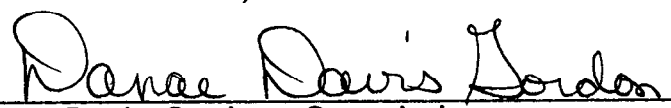
Dated at Madison, Wisconsin this 19th day of July, 1985.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By


Herman Torosian, Chairman


Marshall L. Gratz, Commissioner


Danae Davis Gordon, Commissioner

3/ Sec. 111.07(14), Stats., which is made applicable to Sec. 111.84 proceedings through Sec. 111.84(4), Stats., provides:

The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.