STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN STATE EMPLOYEES UNION (WSEU), AFSCME, AFL-CIO, and MARY CZYNSZAK-LYNE, Complainants, vs. STATE OF WISCONSIN, DEPARTMENT OF EMPLOYMENT RELATIONS, Respondent.	Case 258 No. 40571 PP(S)-145 Decision No. 25893-A

Appearances:

Mr. Richard V. Graylow, Lawton & Cates, Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, appearing on behalf of the Complainants.

Mr. David C. Whitcomb, Attorney at Law, Room 600, One West Wilson Street, P.O. Box 7850, Madison, Wisconsin 53707-7850, appearing on behalf of the Respondent.

ORDER GRANTING IN PART AND DENYING IN PART COMPLAINANTS' MOTION TO DEFER TO ARBITRATION

The above-captioned Complainants filed a complaint of unfair labor practices on May 18, 1988 with the Wisconsin Employment Relations Commission; following attempts by Examiner Houlihan to mediate a settlement herein, Hearing Examiner Sharon Gallagher Dobish was assigned to the case on July 27, 1988; on July 28, 1988 Examiner Dobish called the parties' counsel to attempt to set a hearing date herein; Respondent's counsel was unavailable on July 28th but Complainants' counsel orally requested that this case be held in abeyance pending the outcome of a case before the State Personnel Commission regarding Ms. Czynszak-Lyne; the Examiner then confirmed Complainants' request in writing to the parties by letter dated August 1, 1988; in a letter dated August 23, 1988, the Respondent requested that this case be set for hearing based upon its contention that the allegations herein are distinct from those before the Personnel Commission; on August 30, 1988, the Examiner held a conference at the Wisconsin Employment Relations Commission offices in which Respondent's August 23rd contentions were discussed and Complainants' counsel requested 30 days in which to respond to Respondent's contentions; Respondent's counsel agreed to this "briefing" schedule and thereafter Respondent's counsel also agreed to grant Complainants' counsel an extension of time to file its brief thereon; on October 13, 1988 Complainants filed a First Amended Complaint along with a Motion to Defer this case to grievance arbitration; the Examiner by letter of October 25, 1988, requested that the parties brief the issue of deferral as well as submit other information by close of business on December 5, 1988; the Respondent then filed its answer to the Complaint and Amended Complaint on November 8, 1988; the Examiner received the parties' briefs and the requested data regarding the Motion to Defer by December 9, 1988. The Examiner has considered all briefs, arguments and data submitted by the parties and is satisfied that the Complainants' Motion to Defer should be denied in part and granted in part as follows.

NOW THEREFORE, it is hereby

ORDERED

1. That the parties proceed to a Wisconsin Employment Relations Commission hearing regarding the allegations of the Complaint/Amended Complaint which assert

that Respondent violated Secs. 111.84(1)(a), (b) and (c) by transferring Ms. Czynszak-Lyne to a different job effective January 31, 1988 and by disciplining her on June 21, 1988 and September 13, 1988 all allegedly because of her union and/or protected concerted activities.

2. That the allegations regarding whether or not just cause existed for Respondent's having issued Ms. Czynszak-Lyne two disciplinary letters (dated June 21, 1988 and September 13, 1988) are hereby deferred to the parties' 1987-89 contract grievance arbitration procedure and further Commission action thereon is held in abeyance. The Examiner will dismiss this aspect of the instant matter on motion of either party upon a showing that the subject matter of the claimed violation of Sec. 111.70(3)(a)4, Stats., has been resolved in a manner not clearly repugnant to the underlying purposes of MERA.

Dated at Madison, Wisconsin this 13th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon Gallagher Dobish
Sharon Gallagher Dobish, Examiner

STATE OF WISCONSIN, DEPARTMENT
OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING ORDER GRANTING
IN PART AND DENYING IN PART COMPLAINANTS'
MOTION TO DEFER TO ARBITRATION

POSITIONS OF THE PARTIES:

The Complainants rely exclusively upon State of Wisconsin (DER), Dec. No. 25393 (WERC, 4/88) for the proposition that in cases where it is likely that the disposition of ULP's will depend upon an interpretation of the parties' labor agreement, deferral to arbitration is not only advisable but is also a mechanism found to be appropriate and employed by the Commission. Complainants did not address Respondents' procedural arguments regarding ERB 22.04.

Respondent did not address the State of Wisconsin case cited by Complainants. Respondents essentially argue that ERB 22.04 requires that a hearing be initially scheduled for a date between 10 and 40 days after the filing of the complaint; that ERB 22.04 uses the assertedly mandatory word "shall" indicating that the hearing must be scheduled for a date during the 10 to 40 day period. Upon this basis, Respondent urges that the hearing herein be scheduled and the Complainants' Motion to Defer be denied.

PROCEDURAL BACKGROUND

At the outset, it should be noted that it is the Commission's longstanding policy to assign a Senior staff member to attempt to mediate complaint cases upon the filing of the Complaint. This mediation function is performed without communicating any aspect of its particulars to the Examiner who is ultimately assigned to hear the case. All that the Examiner knows when he or she recieves the file is that the mediation function has been performed.

In this case, the file contains a letter dated June 16, 1988 from Staff Mediator Houlihan indicating that the parties agreed to hold the case in abeyance pending possible resolution of the matter between them. Thereafter, on July 27, 1988, the undersigned received the file, and on July 28th, she attempted to contact the parties regarding scheduling. The undersigned, unable to reach Respondent counsel, reached Mr. Graylow who advised without elaboration that it was his view that the case should be held in abeyance pending the outcome of a case concerning Ms. Czynszak-Lyne then pending before the State Personnel Commission. The undersigned confirmed this conversation in a letter to the parties dated August 2, 1988. Respondent, by its attorney Mr. Whitcomb then responded with its letter dated August 23, 1988 requesting a hearing be set herein. On August 30, at the request of the Examiner, the parties met and discussed Mr. Whitcomb's August 23rd letter. At this time Mr. Graylow stated that he needed time to respond to Respondent's request for a hearing and Mr. Whitcomb agreed to allow Mr. Graylow 30 days to submit such a response in writing. As Mr. Whitcomb had been called out-of-state on a personal matter at the end of September when Mr. Graylow requested an extension of time to file his response, the undersigned granted Mr. Graylow's request for one extension to which Mr. Whitcomb did not object. On October 13th, Mr. Graylow filed a First Amended Complaint and a cover letter in which Mr. Graylow stated "In light of the allegations having to deal with the breach of our collective bargaining agreement, I assume deferral is in order." Mr. Graylow then quoted from State of Wisconsin (DER), Dec. No. 25393 (WERC, 4/88). Due to the procedural issue raised by Mr. Graylow and the need for receipt of Respondent's Answer as well as certain documents necessary to determine the merits of the Motion, the undersigned requested in writing that the parties submit the above documentation by close of business December 5th.

Respondent's Answer was timely filed as were the parties briefs on Complainants' Motion to Defer although due to an apparent oversight, Complainants did not submit copies of the grievances until December 9, 1988.

DISCUSSION

It is in this factual context that Respondent has argued that ERB 22.04 requires that a hearing be held within the 10 to 40 day period following the filing of the Complaint. Initially, it should be noted that the cases cited by Respondent are inapposite here. First, both State ex rel. Clarke v. Carballo 83 Wis.2d 349 (1978) and State ex rel. Wisconsin State Journal v. Circuit Court for Dane County, 131 Wis.2d 515 (1986) involved criminal proceedings which raised individual due process and other constitutional claims not present here. Second, these cited cases did not address the proper meaning and interpretation to be given to Sec. 111.84, Stats. or to ERB 22.04.

Furthermore, beyond the questionable applicability of the cases cited by Respondent, I note that Respondent agreed to hold the hearing herein in abeyance, as documented by Houlihan's June 16th letter. Thus, Respondent arguably waived its right, under ERB 22.04, to a hearing within the 10 to 40 day period after the May 18th filing of the Complaint.

In this regard, it should be noted that Respondent's citation and use of Karnow v. Milwaukee County Civil Service, 82 Wis.2d 565 (1978) is consistent with a line of cases which have concerned whether the word "shall" in a statute or rule should be construed as mandatory or merely directory. The generally accepted rule in this area is that a statute or administrative rule setting a time limit in which an agency must act is merely directory, unless it denies the exercise of the power to act after such time period or the statutory language shows that the time was intended to be a specific limitation. Nothing in ERB 22.04 stands to deny the Commission the power to set a hearing date after the 40-day period has expired. Furthermore, there does not appear to be any language in ERB 22.04 which sufficiently or clearly states that the 10 to 40 day time for holding a complaint hearing was legislatively intended to be a limit beyond which Commission jurisdiction would effectively lapse and no hearing could be held. 1/

Finally, Respondent's conduct following the Examiner's assignment to this case demonstrates Respondent's willingness to hold this case in abeyance pending Mr. Graylow's response to Mr. Whitcomb's request for a hearing and thereafter pending briefing and receipt of the Answer and other documents required to rule on Complainants' October 13th Motion to Defer. Indeed, given Complainants' Motion to Defer, the Examiner could not fairly schedule and conduct the hearing herein without, effectively denying Complainants' Motion to Defer without having given said Motion proper consideration or having given the parties a fair chance to address the issues raised in the Motion.

Having found Respondent's procedural claims to be insufficient to block consideration of Complainants' Motion to Defer, I turn now to the merits of that Motion.

In State of Wisconsin (DER), Dec. No. 25393 (WERC, 4/88), the case cited by Complainants, the Commission deferred to arbitration certain alleged violations of the parties' labor agreement -- specifically, the State's using prison inmates and LTE's to perform unit work rather than hiring regular full or part-time bargaining unit employes. Significantly, the Commission decided that the use of such non-bargaining unit employes was not motivated in any part by hostility toward any employe's exercise of concerted activity and that the State did not intend to threaten or undermine the Union by its use of inmates and LTE's. Thus, the only allegations which were deferred to arbitration in the State of Wisconsin case were alleged violations of the parties' collective bargaining agreement; the Commission specifically did not defer the union animus/unfair labor practice allegations pleaded in the State of Wisconsin case.

As the Commission stated in School District of Menomonee Falls, Dec. No. 16724-B (WERC, 1/81):

1/ Cf. Muskego-Norway Consolidated Schools Joint School District No. 9 v. WERB, 32 Wis.2d 478, 485c and d (1966).

> Generally, where the complaint alleges an independent violation of a refusal to bargain in good faith, pursuant to Sec. 111.70(3)(a)4 of the Municipal Employment Relations Act, and the collective bargaining agreement contains a provision which provides that the alleged activity may also constitute a violation of the collective bargaining agreement, the Commission will defer to arbitration in such instances, except where the issue involves a determination as to whether the matter involved cannot be determined by the criteria contained in the pertinent provisions of the collective bargaining agreement, or where the matter involved is of such importance that the Commission determines it is necessary to establish a policy as to whether such matter requires a determination as to the duty to bargain on such matter within the meaning of MERA. (Emphasis in the original)

It should be noted that the Commission has continued to follow this general approach. See, e.g. Brown County (Sheriff's Dept.), Dec. No. 19314-B (WERC, 6/83); Columbia County, Dec. No. 22683-B (WERC, 1/87). Thus, I find that deferral is appropriate, as outlined in the Order infra.

However, those allegations which address themselves to activities of the State of Wisconsin which were allegedly motivated at least in part by anti-union animus are peculiarly within the Commission's power to determine, and cannot be determined by the criteria contained in the parties' collective bargaining agreement. Furthermore, I note that these specific allegations are neither before an arbitrator in the grievance cases (based upon the grievances dated submitted on July 8, 1988 and September 28, 1988), nor are they before the Personnel Commission, (based upon the complaint and documentation now pending before the Personnel Commission). 2/

I therefore leave to the arbitrator(s) the interpretation of the parties' agreement -- whether there was just cause for the two letters of reprimand (dated June 21, 1988 and September 13, 1988) issued to Ms. Czynszak-Lyne. I shall contact the parties to attempt to schedule the earliest possible hearing date on the remainder of the complaint allegations.

Dated at Madison, Wisconsin this 13th day of February, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon Gallagher Dobish
Sharon Gallagher Dobish, Examiner

2/ Ms. Czynszak-Lyne filed a grievance, dated received on October 14, 1988 (two days after Complainants' Counsel sent his First Amended complaint along with his letter moving for deferral of these grievances to arbitration). In that grievance, Ms. Czynszak-Lyne indicated without elaboration that she was being interfered with by the State in processing employe grievances. This grievance shall not be deferred. Rather, it shall be heard along with all other alleged unfair labor practice contentions not ordered to be deferred to arbitration.