STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

BELOIT FIRE FIGHTERS, LOCAL UNION NO. 583, IAFF, AFL-CIO, Complainant, vs. CITY OF BELOIT (FIRE DEPARTMENT) Respondent.	Case 77 No. 41525 MP-2178 Decision No. 25917-B

Appearances:
Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, Madison, Wisconsin 53703-2594, by Mr. Richard V. Graylow, appearing on behalf of the Complainant.
Mr. Daniel T. Kelley, City Attorney, 416 College Avenue, Beloit, Wisconsin 53511, appearing on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS AND DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

Beloit Fire Fighters, Local Union No. 583, IAFF, AFL-CIO, hereinafter referred to as Complainant, having on January 10, 1989, filed a complaint with the Wisconsin Employment Relations Commission alleging that the City of Beloit, hereinafter referred to as Respondent, had committed prohibited practices within the meaning of Secs. 111.70(3)(a)1, 3 and 4 of the Municipal Employment Relations Act by unilaterally making changes to the employe's health and dental insurance plans; and the Commission having, on March 1, 1989, appointed Amedeo Greco, 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 Sec. 111.07(5), Stats.; and due to the unavailability of Examiner Greco, the Commission having on May 12, 1989, substituted the undersigned as Examiner; and the Respondent having, on May 2, 1989, filed a Motion to Dismiss the complaint on the grounds that said complaint failed to state a cause of action, failed to allege any acts occurring with the one year statute of limitations, Complainant had failed to exhaust the contractual grievance procedure and Complainant had failed to make the complaint more definite and certain after having previously agreed to do so; and hearing on the Motion to Dismiss having been held in Beloit, Wisconsin on May 16, 1989; and the parties having filed briefs on the Motion to Dismiss, the last of which was received on July 7, 1989; and the Examiner having considered the record and the arguments of counsel concludes that the complaint should not be dismissed and the matter should be deferred to grievance arbitration;

NOW, THEREFORE, it is

ORDERED

1. That the Motion to Dismiss is denied.

2. That the complaint is deferred to grievance arbitration with the Examiner retaining jurisdiction over the matter, to ensure that the issues raised by the complaint are both resolved, and if appropriate, adequately remedied by arbitration.

Dated at Madison, Wisconsin this 1st day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

CITY OF BELOIT (FIRE DEPARTMENT)

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS AND DEFERRING COMPLAINT TO GRIEVANCE ARBITRATION

The Respondent bases its Motion to Dismiss on four grounds. The first reason for its motion is that the complaint fails to raise any genuine issue of fact or law. The Respondent asserts that there is no specificity as to the date or nature of the alleged insurance changes, no evidence of any event

within a year of the filing of the complaint and the mere citation of the statute rather than a specific statutory violation, and thus the motion should be appropriately granted.

The Respondent for its second reason contends that the complaint is barred by Sec. 111.07(14), Stats., because there are no violations alleged within one year of the filing of the complaint. It points out that a grievance was filed dated February 16, 1987 on changes to health insurance and the complaint was filed more than a year after the Complainant ceased to pursue this grievance, so the complaint is barred by the statute of limitations. It submits that the Complainant is attempting to circumvent the timeliness of the grievance procedure by the instant complaint.

The Respondent argues that the third reason to dismiss the complaint is the failure to follow the contractual grievance procedure. It notes that health insurance provisions are covered at Article VII of the parties' Agreement and the appropriate forum is the grievance procedure and not a prohibited practice proceeding. It maintains that no exceptions are present which allow the Commission to assert its jurisdiction over breach of contract allegations. It insists that the Complainant failed to exhaust the grievance procedures and the complaint should therefore be dismissed. It claims the grievance filed by the Complainant in 1987 which it failed to pursue is now being resurrected in the instant complaint as an after thought and should not be allowed.

The fourth reason offered by the Respondent to dismiss the complaint is the failure of the Complainant to provide a copy of its expert's preliminary report until the hearing on the Motion to Dismiss. It submits that where discovery is not provided, dismissal is appropriate. It notes that Respondent attempted to get the information of alleged violations but to no avail and as a result of the Complainant's failure to provide the information, the Complaint lacks specificity sufficient to constitute a claim. The Respondent asks that the complaint be dismissed for any or all of the reasons set forth above.

The Complainant opposes the Motion to Dismiss and contends that the complaint conforms with the requirements of Wis. Adm. Code Section ERB 12.02(2) so that a legally cognizable complaint has been filed. The Complainant insists that the complaint complies with the one year statute of limitations pointing to paragraph 6. of the complaint alleging that the Respondent made changes to the health insurance program within the last year. It also refers to Exhibit 5 which lists about 30 changes made on or about June 11, 1988, which is within one year of the date of filing the complaint on or about January 6, 1989.

The Complainant insists that exhaustion of the grievance procedure is not required because the complaint does not allege a Sec. 111.70(3)(a)5 violation, only Secs. 111.70(3)(a)1, 3 and 4, Stats., so no collective bargaining agreement violations have been alleged or pleaded and there is no reason to arbitrate.

Lastly, the Complainant insists that the requested information/documents were provided directly to the City Manager and it was understood that copies would be forwarded to the City Attorney so any problem lies with the City Manager and not Complainant.

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DISCUSSION

Where a complaint fails to raise a genuine issue of fact or law, it may be dismissed for failure to state a claim. 1/ However, on a motion to dismiss, the complaint must be liberally construed in favor of the complainant because of the dramatic consequences of denying a hearing on the complaint and the motion will be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 2/ The instant complaint alleges unilateral changes in the Health Insurance Program without bargaining same with the Complainant. Construing these allegations most favorably to the Complainant, it must be concluded that the complaint does state a claim. It does state factual assertions which are contested and a hearing is required on them. Therefore, the motion cannot be granted on the grounds of the failure to state a claim.

With respect to the statute of limitations, Sec. 111.07(14), Stats. sets out a one year limitation. A review of the complaint and Ex-5 indicates that changes in the Health Insurance Program are alleged to have occurred as of 6-1-88 which is within one year of the filing of the complaint on January 10, 1989. Again the complaint must be liberally construed in favor of Complainant and it follows that the allegations of changes within the year of the complaint preclude a dismissal of the complaint on the basis of a failure to comply with the statute of limitations.

With respect to the failure to exhaust the grievance procedure, it appears that the Respondent might be making res-adjudicata or collateral estoppel arguments for dismissal of the complaint. However, the allegations of the complaint relate to changes made after the 1987 grievance was filed and dropped otherwise it would not meet the statute of limitations. The allegation of new changes within the last year, if true, would not have been covered by the prior grievance, so these arguments must fail.

On the other hand, as correctly noted by the Respondent, the Commission's long standing policy regarding breach of contract allegations is not to assert jurisdiction but to defer these to the parties' agreed upon procedure for resolving such disputes. 3/ Here, the Complainant has argued that it is not alleging a violation of the terms of the parties' collective bargaining agreement but is alleging that Respondent has violated Secs. 111.70(3)(a)1, 3 and 4, Stats. Under such circumstances, the exhaustion of remedies doctrine cannot be appropriately applied. 4/ The undersigned does find persuasive the Respondent's assertion that the complaint does allege a contractual violation of Article VII of the parties' collective bargaining agreement. Where the complaint alleges a violation of the statute and the collective bargaining agreement contains a provision which provides that the alleged activity may also constitute a violation of the collective bargaining agreement, whether to exercise jurisdiction, the Commission considers the following:

> (1) the parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
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> (2) the collective bargaining agreement must clearly address itself to the dispute; and

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1/ Racine Unified School District, Dec. No. 15915-B (Hoornstra, 12/77).

2/ Id.

3/ Joint School District No. 1, City of Green Bay, et. al., Dec. No. 16753-A,B (WERC, 12/79); Board of School Directors of Milwaukee, Dec. No. 15825-B (WERC, 6/79); Oostburg Joint School District, Dec. No. 11196- A,B (WERC, 12/79).

4/ City of Milwaukee, Dec. No. 13083 (WERC, 10/74).

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(3) the dispute must not involve important issues of law or policy. 5/

The undersigned is unsure whether the Respondent is willing to arbitrate the merits and renounce technical objections such as timeliness but if it is, the undersigned would be satisfied that the three considerations set forth above would be met and deferral would be appropriate. If Respondent is not willing to arbitrate the merits, then deferral will not be appropriate. Inasmuch as the Respondent has raised this objection, the undersigned must assume that it will waive technical objections and proceed to arbitrate the merits. The undersigned thus defers the matter to grievance arbitration but retains jurisdiction and will hold this matter in abeyance to ensure that any arbitration award is not inconsistent with statutory policy. If the undersigned's assumption is wrong and Respondent will not proceed to arbitrate the merits, then a prompt hearing in the matter will be scheduled.

The final grounds for dismissal of the complaint was the failure to provide specific information as to the alleged changes. Complainant has agreed that its expert may be deposed by Respondent prior to any hearing in this matter and therefore, the Respondent will have ample opportunity to be apprised of the specifics of the changes so it may be adequately prepared for any hearing on the matter. Thus, a dismissal on the grounds of refusal to provide information is not warranted.

For the reasons set forth above, the Motion to Dismiss is denied and the matter is deferred to grievance arbitration on the assumption the Respondent will waive any technical objections so the matter can proceed on the merits. If Respondent does not waive its technical objections, then the undersigned will promptly schedule a hearing on the complaint.

Dated at Madison, Wisconsin this 1st day of August, 1989.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Lionel L. Crowley, Examiner

5/ Racine Unified School District, Dec. No. 18443-B (Houlihan, 3/81).