

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| WAUSAU CITY EMPLOYEES UNION, | : | |
| LOCAL 1287, AFSCME, AFL-CIO, | : | |
| | : | |
| Complainant, | : | Case 64 |
| | : | No. 45377 MP-2458 |
| vs. | : | Decision No. 26919-C |
| | : | |
| CITY OF WAUSAU, | : | |
| | : | |
| Respondent. | : | |
| | : | |

ORDER DENYING MOTION TO DISMISS COMPLAINT

On February 22, 1991, Wausau City Employees Union, Local 1287, AFSCME, AFL-CIO, hereafter Complainant, filed a complaint with the Wisconsin Employment Relations Commission, hereafter Commission, alleging that the City of Wausau, hereafter Respondent, has committed certain prohibited practices by violating Section 111.70(3)(a)1 and 111.70(3)(a)3, Stats. On September 3, 1991, the Respondent filed an Answer to the prohibited practice complaint and a Motion to Dismiss. On October 11, 1991, the Commission appointed Coleen A. Burns, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter. On October 8, 1991, the Complainant filed a response to Respondent's Motion to Dismiss. Having considered the Respondent's Motion to Dismiss and Complainant's response thereto;

NOW, THEREFORE it is

ORDERED

That the Motion to Dismiss Complaint is denied.

Dated at Madison, Wisconsin this 1st day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

CITY OF WAUSAU

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS COMPLAINT

Relying upon the doctrine of res judicata, Respondent argues that the May 9, 1991 grievance arbitration award issued by Arbitrator William W. Petrie constitutes an absolute bar to this prohibited practice complaint action. Respondent further argues that the parties' contractual grievance procedure provides that the arbitrator's written decision in all matters involving disputes between labor and management is to be "final and binding on both parties" and, thus, to permit the matter to be relitigated in the complaint proceedings would be to render the contractual grievance procedure a sham and destroy confidence in the contractual arbitration process. Respondent maintains that, by filing the Complaint, the Complainant has violated the provision of the parties' collective bargaining agreement which provides for final and binding grievance arbitration. Respondent further maintains that to permit the Complainant to relitigate the matter before the Commission would be extremely prejudicial to Respondent.

Complainant argues that Arbitrator Petrie was charged with interpreting and applying the terms of the parties' labor agreement and not with interpreting and applying either Sec. 111.70(3)(a)1 or Sec. 111.70(3)(a)3 of the Municipal Employment Relations Act. Complainant asserts that the arbitration proceeding and the complaint proceeding do not share an identity of issue and, therefore, the doctrine of res judicata is not applicable.

In his award of May 9, 1991, Arbitrator Petrie addressed the following two issues:

- (1) Were the discipline and the discharge of the Grievant supported by just cause? If not, what is the appropriate remedy?
- (2) Did the Employer violate the labor agreement as alleged in the grievances comprising Exhibits No. 7 and 9? If so, what is the appropriate remedy?

In Exhibit #7, the Grievant sought payment for overtime of 1.25 hours at time and one-half and in Exhibit #9 the Grievant sought payment for 13.75 hours of compensatory time.

The complaint which was filed in this matter does not contain an allegation that Respondent disciplined and/or discharged Debra Parmer, the Grievant in the arbitration proceedings before Arbitrator Petrie, without just cause. Nor does the Complaint contain an allegation that Respondent violated the parties' collective bargaining agreement as alleged in Exhibits No. 7 and 9.

The complaint alleges that upon receipt of a grievance filed by Debra Parmer, Municipal Judge Brady destroyed Ms. Parmer's certificate appointing her as Municipal Court Clerk; that when Judge Brady informed Ms. Parmer that he wished to meet with her concerning her grievance, he refused Ms. Parmer's request to have a Union Steward present at the meeting; that Judge Brady asked Ms. Parmer if she intended to withdraw her grievance and after being told by Ms. Parmer that she would not withdraw the grievance, Judge Brady issued several reprimands to Ms. Parmer; and that, on or about August 7, 1990, Judge Brady discharged Ms. Parmer. Complainant further alleges that, by this conduct, Respondent interfered with, coerced, and discriminated against employes for the conduct of lawful union activity in violation of Sec. 111.70(3)(a)1 and Section 111.70(3)(a)3, Stats.

The Commission has held that a prior arbitration award is res judicata with respect to a prohibited practice complaint when the arbitration award and the complaint before the Commission contain an identity of issues, parties and relief sought and there is no material discrepancy of fact between the dispute governed by the award and the dispute which is the subject of the complaint. 1/

As the Complainant argues, Arbitrator Petrie was not presented with and did not address the issue of whether or not Respondent engaged in conduct which was in violation of Sec. 111.70(3)(a)1 or Sec. 111.703(a)3. 2/ Accordingly, the Petrie award is not res judicata with respect to the matters raised in the complaint.

The fact that the parties' collective bargaining agreement contains a provision for final and binding arbitration of grievances does not preclude the Complainant from litigating the matters raised in the complaint. The Commission has long held that it:

has the authority to make determinations and order relief in cases involving noncontractual unfair labor practices, even despite, contrary to, or concurrently with the arbitration of the same matters. The possibility of full relief through arbitration does not preclude (the Commission) from fully adjudicating alleged noncontractual violations of the statutes which it enforces. 3/

As Examiner Levitan concluded in Manitowoc County, if such dual actions are permissible where the actions are the same, it follows, that such dual actions must be permissible where, as here, the cause of actions are distinct. 4/

In Universal Foods, the Commission was confronted with a statutory claim which had the same factual underpinnings as the contractual claim which had

1/ Department of Administration, Dec. No. 14823-A (Yaeger, 1/77); City of Onalaska, Dec. No. 23483-A (Shaw, 6/86), aff'd by operation of law; State of Wisconsin, Dec. No. 20145-A (Burns, 5/83), aff'd by operation of law.

2/ As the Complainant argues, the brief dicta appearing in the Petrie decision concerning NLRB v. Weingarten is neither relevant to, nor dispositive of, the issues before the Examiner.

3/ Milwaukee Elks, Dec. No. 7753 (WERC, 10/66).

4/ Decision No. 26665-A (Levitan, 4/91), aff'd by operation of law.

been decided by the Arbitrator. 5/ The Commission, concluding that the statutory claim involved a separate and distinct theory of recovery from that urged before the Arbitrator, stated that:

. . . we are not persuaded the Legislature intended to deprive litigants of the opportunity to pursue statutory or common law rights before administrative agencies or courts merely because the propriety of the conduct in question has already been litigated in a contractual forum.

While Universal Foods involved an action brought under the Wisconsin Employment Peace Act, the Examiner considers the Commission's rationale to be equally applicable to actions brought under the Municipal Employment Relations Act.

In summary, the Petrie Award is not res judicata with respect to the issues raised in the complaint. Nor does the existence of a contract provision providing for final and binding arbitration of grievances preclude the Complainant from litigating the matters raised in the complaint in the instant complaint proceeding.

The Examiner has denied Respondent's Motion to Dismiss Complaint and has concluded that the complaint, including the remedy sought, presents a contested case, 6/ requiring a full hearing on the pleadings. 7/

Dated at Madison, Wisconsin this 1st day of November, 1991.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Coleen A. Burns, Examiner

6/ Wisconsin Statutes, Sec. 111.07(2)(a), Sec. 111.07(4), Sec. 227.

7/ Mutual Fed. Savings & Loan Assoc. v. Savings & Loan Adv. Comm., (1968) 38 Wis. 2d 381; State ex rel. City of La Crosse v. Rothwell, (1964) 25 Wis. 2d 228, rehearing denied; Town of Ashwaubenon v. Public Service Commission (1963) 22 Wis. 2d 38, rehearing denied; State ex rel. Ball v. McPhee (1959) 6 Wis. 2d 190; General Electric Co. v. Wisconsin Employment Relations Board (1957) 3 Wis. 2d 227.