

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

:

BROWN COUNTY SHELTER CARE EMPLOYEES, :

LOCAL 1901-F, AFSCME, AFL-CIO, :

:

Complainant, : Case 482

: No. 48350 MP-2659

vs. : Decision No. 27553-A

:

BROWN COUNTY, :

:

Respondent. :

:

Appearances:

Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 5 Odana Court, Madison, Wisconsin 53719, appearing on behalf of Brown County Shelter Care Employees, Local 1901-F, AFSCME, AFL-CIO, referred to below as the Union.

Mr. John C. Jacques, Assistant Corporation Counsel, 305 East Walnut, P.O. Box 23600, Green Bay, Wisconsin 54305-3600, appearing on behalf of Brown County, referred to below as the County.

ORDER DENYING MOTION TO DISMISS

The Union, on November 19, 1992, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission, alleging that the County had violated Secs. 111.70(3)(a)1 and 5, Stats., "by discharging Julie Sowers, and by refusing to process the grievance in accordance with the contract." The Union's complaint contains, among its allegations, the following:

C. The Union and the County have been parties to a series of collective bargaining agreements . . .

D. Julie Sowers was employed by the County at all pertinent times in a position represented by the Union. On or about October 1, 1992, she was discharged from employment with the County. On or about October 1, 1992, Sowers and the Union filed a grievance in accordance with the contractual grievance procedure. Since on or about October 14, 1992, the County has refused to process the grievance in accordance with the contract including, but not limited to, submitting the matter to grievance arbitration.

E. The County violated the parties collective bargaining agreement when it discharged . . . Sowers and by refusing to process the grievance pursuant to the terms of the collective bargaining agreement.

The County filed a "Motion to Dismiss Complaint For Lack of Standing" with the Commission on December 23, 1992. The County's motion contains, among its allegations, the following:

1. . . . Complainant is not the . . . exclusive bargaining representative for "on-call" employees as is set forth in Art. 2 of the attached collective bargaining agreement . . .

2. "On-call" employees have not been certified as members . . .

represented by the Complainant and that the WERC Certification Order . . . (attached hereto) specifically included only regular full-time and regular part-time non-professional employees and did not include casual or on-call employees.

3. The said collective bargaining agreement referred to in the Complaint does not authorize the complainant to represent "on-call" employees who are considered separate from and have been treated separately from Local 1901-F represented employees by the Union and the Employer and neither certification from WERC nor voluntary recognition has been made for on-call employees to allow complainant to file a prohibited practice complaint on behalf of non-member on-call employees. On-call employees have not been granted grievance benefits under the Local 1901-F contract and such benefits have been excluded.

In a letter to the parties dated January 6, 1993, I asked the Union to put its position on the motion into writing. The Union filed its response on January 27, 1993, and the County filed a response to the Union on February 1, 1993.

ORDER

The County's Motion To Dismiss For Lack Of Standing, filed with the Commission on December 23, 1992, is denied.

Dated at Madison, Wisconsin, this 11th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner

MEMORANDUM ACCOMPANYING
ORDER DENYING MOTION TO DISMISS

THE PARTIES' POSITIONS

The Union's Position

The Union asserts that the County's motion is "without merit", and that even if the motion cannot be summarily dismissed, whatever merit it has "raises issues of fact that can only be decided after a hearing on the matter." The Union dismisses as "inaccurate" any County contention that the complaint "raises no issue of fact." Such issues can readily be discerned, according to the Union, "by comparing the County's Motion with the facts asserted in the Complaint." More specifically, the Union argues that it "is a labor organization recognized by the County as the exclusive bargaining representative for on-call employees of the Brown County Shelter Care," thus entitled to raise grievances on behalf of on-call employees. That on-call employees "are clearly represented by the Union" is demonstrated, the Union concludes, by a Memorandum of Understanding attached to the collective bargaining agreement, and by the fact that Article 2 of that agreement "does not specifically exclude on-call employees". The Union concludes by requesting that "the County's Motion to Dismiss be dismissed or in the alternative that a hearing on said Motion be conducted before a ruling is made."

The County's Position

In a memorandum accompanying its motion, the County asserts that Sec. ERB 12.02(1) of the Commission's rules requires that to have standing, the Union must be a party in interest. Contending that Sowers is not a member of a bargaining unit represented by the Union, the County concludes that the Union lacks standing to advance the complaint. That Sowers is not a unit member is established, according to the County, by the fact that Article 2 "does not cover on-call employees," and by the fact that the Commission's certification of the unit does not include a reference to on-call employees. Citing Chauffeurs, Teamsters and Helpers v. WERC, 51 Wis.2d 391, 401-406 (1971), the County argues that "a union has no standing to bring a complaint where it is not the statutory bargaining representative of the employees."

The County asserts that Sowers, as an on-call employee, "does not pay union dues" and "has no right to be represented by Local 1901F." On-call employees, according to the County, "are not covered by the collective bargaining agreement," and have "no grievance rights." It necessarily follows, the County concludes, that "the Union cannot grieve when the employee herself cannot grieve." To find standing permits, the County asserts, the Union to circumvent "the statutory procedure necessary for bargaining representative status."

The County's next major line of argument is that the collective bargaining agreement contains no provision which even facially covers the grievance. The County concludes that because the grievance is not arbitrable, it was under no obligation to process it.

The County concludes that "Local 1901F has no standing to file a . . . complaint and therefore the Commission is without jurisdiction."

In a letter filed in response to the Union's statement of position, the County urges that standing must be determined from two documents -- the

Commission's certification of the unit and the recognition clause of the parties' collective bargaining agreement. Because neither mentions on-call employees, and because each specifically refers to "regular" full and part-time employees, the County concludes that the Union has failed to show any interest in this matter which would grant it standing to assert the complaint.

DISCUSSION

The County's motion questions not the merit of the Union's complaint, but the Union's standing to bring it. The County accurately notes that Section ERB 12.02(1), Wis. Adm. Code, limits the right to file a complaint to "any party in interest." This provision parrots the language of Sec. 111.07(2)(a), Stats., which, under the terms of Sec. 111.70(4)(a), Stats., governs the processing of complaints of prohibited practice.

The issue posed by the motion, then, is whether the Union can be considered a "party in interest" to Sowers' discharge. As preface to examination of this point, it must be noted that the procedures of Sec. 111.07(2)(a), Stats., view standing expansively. That section notes that, in addition to the party filing a complaint, "(a)ny other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application."

Against this background, the County's assertion that the Union cannot be considered to represent Sowers can serve as a basis to dismiss the complaint only if the Union has failed to advance a plausible claim to serve as Sowers' representative. As the County accurately points out, a claim to serve as an exclusive bargaining representative can result from the statutory process culminating in Commission certification, or through the contractual process culminating in an employer's voluntary recognition of a union as the exclusive bargaining representative. 1/

Accepting the County's claim that neither the Commission's certification of the representative of this unit, nor Article 2 of the collective bargaining agreement can be read to make the Union the representative of on-call employees, cannot, however, eliminate the Union's arguable interest in this matter. Attached to the parties' labor agreement is a five page "MEMORANDUM OF UNDERSTANDING", headed "On-Call Employees". The prefatory paragraph to the memorandum states: "For the purposes of this memorandum of understanding, on-call employees shall be considered as a separate bargaining unit associated with Local 1901F." For at least the purpose of enforcing the Memorandum, then, the Union has advanced a plausible claim to serve as Sowers' representative. Whether the Memorandum grants on-call employees any of the contractual rights advanced in the complaint by the Union is a point not yet addressed by the parties. That point poses, however, the merit of the complaint and the merit of the complaint, under Sec. 111.07(2)(a), Stats., is determined by "hearing on such complaint".

In sum, the Union has advanced a plausible basis to ground its assertion that it serves as the exclusive collective bargaining representative of Sowers. It follows from this that the Union is a party in interest to this matter. Accordingly, the Union has standing to advance a complaint on Sowers' behalf and the County's motion has been denied.

Dated at Madison, Wisconsin, this 11th day of February, 1993.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

1/ See Wauwautosa Board of Education, Dec. No. 8300-A (WERC, 2/68); or Village of Deerfield, Dec. No. 26168 (WERC, 9/89).

By Richard B. McLaughlin /s/
Richard B. McLaughlin, Examiner