STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARK J. BENZING, Complainant, vs. BLACKHAWK VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT, Respondent.	:	Case 54 No. 50320 MP-2844 Decision No. 28083-B
MARK J. BENZING, Complainant, vs. BLACKHAWK VOCATIONAL, TECHNICAL & ADULT EDUCATION DISTRICT, Respondent.	:	Case 56 No. 50677 MP-2866 Decision No. 28084-B

Appearances:
Mr. Mark J. Benzing, 2022 Dewey Avenue, Beloit, Wisconsin 53511 pro se.
Godfrey & Kahn, S.C., 131 West Wilson Street, Suite 202, P.O. Box 1110, Madison, Wisconsin 53701-1110, by Mr. Jon E. Anderson, on behalf of the Employer.

ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO DISMISS CONSOLIDATED COMPLAINTS

On January 7, 1994 Complainant filed a complaint against Respondent in Case 54, No. 50320, MP-2844, later amended on March 2, 1994. On March 13, 1994, Complainant filed a complaint against Respondent in Case 56, No. 50766, MP-2866. On April 12 and 18, 1994, respectively, Respondent filed Motions to Make These Complaints More Definite and Certain and on April 18th Respondent also filed a Motion to Consolidate the captioned cases which Complainant opposed by his letter received on May 11, 1994. On April 14, 1994 the Commission appointed Sharon A. Gallagher, a member of its staff, to act as Examiner in Case 54, No. 50320, MP-2844. On June 7, 1994, Complainant filed a Second Amended Complaint in Case 54, No. 50320, MP-2844. On June 20, 1994, the Commission issued its Order Consolidating these cases. On June 28, 1994, the Commission issued its Order appointing Sharon A. Gallagher to act as Examiner in Case 56, No. 50677, MP-2866. On April 25, 1994, Complainant filed a written opposition to Respondent's Motion to Make the Complaints More Definite and Certain.

In addition, on July 15, 1994 the Examiner ordered Complainant to make his complaints more definite and certain, following Respondent's April 25, 1994 Motion thereon. On July 26, 1994 and August 8, 1994 Complainant complied with the Examiner's July 15th Order.

On August 8, 1994 Respondent renewed its Motion to Dismiss and filed a Motion to Defer to Arbitration the complaint allegations of Sec. 111.70(3)(a)5 violations. By August 31, 1994 Complainant filed a response to Respondent's Motions. By September 7, 1994 Respondent filed its answer to these consolidated complaints.

ORDER

The Respondent's Motion to Dismiss all allegations of violations of Sec. 111.06(1)(4)f, h and k), Stats., is granted. 1/

Respondent's Motion to Dismiss all allegations of violations of Secs. 230.80(8)(a), 230.81, 230.85(1), Stats., is granted.

Respondent's Motion to Dismiss is, in all other respects, denied. Respondent's Motion to Defer is denied as being premature.

Dated at Oshkosh, Wisconsin this 23rd day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

1/ Complainant's reference to 111.06(1)4 was obviously incorrect. Respondent acknowledged as much in its Motions. Complainant clearly meant to refer to 111.06(1)f, g and h, Stats.

MEMORANDUM ACCOMPANYING ORDER GRANTING IN PART AND DENYING IN PART RESPONDENT'S MOTION TO DISMISS CONSOLIDATED COMPLAINTS

Respondent has moved to dismiss allegations relating to violations of Sec. 111.06(1)(4)f, h and k and Secs. 230.80, 230.81 and 230.85 on the ground that this Commission lacks jurisdiction of the Respondent under these Sections of the Wisconsin Statutes.

Respondent has also moved to defer to arbitration the remaining allegations of the consolidated complaints because they are the subject of grievance arbitration cases which the Respondent and Complainant's collective bargaining representative are currently processing through the contract grievance procedure.

Respondent filed its Answer herein on September 7, 1994. Therein, the Respondent admitted disciplining Complainant on April 7, 1993 and June 7, 1993 for incidents that occurred on March 16, 1993 and May 14, 1993 respectively. Respondent denied that Complainant had complied with the labor contract regarding the incidents in question, it generally denied Complainant's blacklisting and discrimination allegations regarding these events and it denied violating the labor agreement by disciplining the Complainant. In its answer Respondent also pleaded certain affirmative defenses including inter alia that the Consolidated Complaints are barred by the Statute of limitations, that the Krinsky arbitration award, issued June 1, 1994 should be deferred to and is res judicata of the issues in surrounding the April 7, 1993 discipline of Complainant and that the complaint should be dismissed regarding those issues; the up-coming arbitration of the issues by Arbitrator Vernon surrounding the June 7, 1993 discipline of Complainant should be deferred to and the complaint allegation regarding those issues should be dismissed.

Complainant filed a position regarding Respondent's Motions to Dismiss/Defer by August 30, 1994. Therein, Complainant requested that the violations of State and Federal law alleged in the Complaints "should be investigated as soon as possible" and that if the Commission lacked "jurisdiction to investigate and correct any or all of the alleged violations," the Examiner should refer Complainant to the proper authorities.

Regarding Respondent's Motion to Dismiss allegations that Respondent violated Sec.s 230.80(8)(a), 230.81, 230.85(1), Stats., this Chapter specifically applies to classified and unclassified Civil Service employes and the State of Wisconsin agencies that employ them. Similarly Sec. 111.06(1)f, g and h also apply only to the State of Wisconsin as an employer and to state employes. Thus, Respondent is correct that these sections of the State Statutes do not apply to Respondent and this Commission, therefore, lacks jurisdiction to rule upon these specific allegations. However, I note that the Complainant's allegations, as delineated, in part, by the language of these non-applicable statutes, if proven, may rise to a violation of Sec. 111.70(3)(a)(1) and (3), Stats., as Complainant has clearly alleged in his Case 54 and Case 56 complaints that he has been "blacklisted" and "discriminated" against because he pursued a complaint in Case 50, No. 46915, MP-2558.

In addition, the Complaints as amended to comply with the Order to Make the Consolidated Complaints More Definite and Certain clearly assert that Respondent has committed prohibited practices in violation of Sec. 111.70, Stats. After studying Respondent's Answer, as well as its Motions and supporting documents, the Examiner is persuaded that the complaints, as amended, present contested cases requiring a full hearing on the pleadings.

This is so, despite Respondent's inappropriate use of references to portions of Chapter 230 and of Section 111.06, Stats. The Examiner notes that under ERB 12.02 allows for liberal amendment of complaints and it allows Complainant, at the end of trial, to move to conform the complaint to the evidence:

> (5) AMENDMENT. (a) **Who may amend.** Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing, or by the commission member or examiner authorized by the board to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.
>
> (b) **Conformance to evidence.** At the conclusion of the hearing, the complaint, on motion, may be amended as necessary to confirm to the evidence as to minor and immaterial variances which might appear in the record.

. . .

The Respondent has moved to defer the allegations of the amended complaints to grievance arbitration. Long-established Commission precedent demonstrates that the Commission has jurisdiction to adjudicate cases which allege both a breach of contract claim as well as prohibited practices. This is so, despite the fact that the breach of contract claim might otherwise be readily resolved through grievance arbitration. It is also clear that the Commission has consistently viewed its power to defer as discretionary. As Examiner Houlihan stated in Racine Unified School District, Dec. No. 18443-B (3/81),

> . . . The Commission has previously stated that it will abstain and defer only after it is satisfied that the Legislature's goal, to encourage the resolution of disputes through the method agreed to by the parties, will be realized, and that there are no superseding considerations in a particular case. Among the guiding criteria considered by the Commission for deferral are 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; 2) The collective bargaining agreement must clearly address itself to the dispute; and 3) The Dispute must not involve important issues of law or policy. (Footnote omitted)

Commission precedent issued both before and after the Racine case has remained consistent with the passage quoted above. 2/

Applying these criteria to the instant case, I note that although the

---

2/ See e.g., City of New Lisbon, et al., Dec. No. 27906-A (Crowley, 2/94); Milwaukee County (Sheriff's Dept.) Dec. No. 27664-A (Crowley, 10/93); Cameron School District, Dec. No. 26832-A (Gallagher, 4/91); State of Wisconsin (DER), Dec. No. 15261 (WERC, 1/78); State of Wisconsin (DER); Dec. No. 24109 (WERC, 12/86); Monona Grove School District, Dec. No. 20700-A (Crowley, 10/83); Milwaukee Board of School Directors, Dec. No. 16724-B (WERC, 1/81).

District has moved Complainant's grievances over the discipline he received on April 7, 1993 to arbitration, the Krinsky award (issued June 1, 1994) did not address Complainant's blacklisting and discrimination claims. Also, regarding the grievance regarding the June 7, 1993 discipline of Complainant (scheduled to be heard by Arbitrator Vernon on October 24, 1994), there is no indication in the documents submitted by the District that the District has agreed to proceed to arbitration on anything more than whether the discipline issued on June 7, 1993 was for just cause. In the absence of an affirmative agreement by the District and Complainant to address the grievance regarding the June 7, 1993 discipline of Complainant as well as all of the discrimination/blacklisting issues in the up-coming Vernon hearing, to waive all procedural and technical objections the first of the Racine tests has not been met.

In regard to the second Racine test, I note that the Article 5, Section 2, subsection 4 states that no reprisals shall be taken for grievance filing, as follows:

> Employees shall have the right to present their grievances without fear of any penalty.

In both the Racine case and in Monona Grove School District, Dec. No. 20700-A (Crowley, 10/83) the labor agreements also contained language prohibiting reprisals for using the grievance procedure. In both Racine and Monona Grove, supra, as in the instant case, Complainant allegations were made that the Respondents had retaliated against a grievant for pursuing a grievance. In both Racine and Monona Grove, supra, Hearing Examiners Houlihan and Crowley found that the described labor contracts clearly addressed the complaint dispute involved, passing the second portion of the Racine test.

Regarding the third portion of the Racine test, because the law regarding retaliation for engaging in protected concerted activity is "both long-standing and well developed," 3/the Hearing Examiners in Racine and Monona Grove, supra concluded no important issues of law or policy were involved in either case. Therefore, both Examiners deferred the retaliation allegations to grievance arbitration given the language of the parties' labor contracts and their full agreement to submit all aspects of the dispute to arbitration. Finally, it is clear that in situations where deferral to arbitration is allowed to deal with retaliation issues, the Examiners retained jurisdiction in order to assure the all matters raised by the complaint which were properly before the Commission are appropriately resolved on the merits and, if proven, adequately remedied. Racine, supra; Monona Grove, supra. This approach has been approved by the Commission. 4/

3/ Racine Unified School District, Dec. No. 18443-B (Houlihan, 3/81) and Monona Grove School District, Dec. No. 20700-A (Crowley, 10/83).

4/ As the Commission held in Brown County (Sheriff-Traffic Dept.) Dec. No. 19314-B (WERC, 6/83), the Commission's discretionary decision to defer does not preclude the Commission from fully adjudicating such

claims if they are not resolved on the merits in fair and timely fashion and in a manner not repugnant to MERA. See also, Cadott School District, Dec. No. 27775-C (WERC, 6/94).

Although this case meets the second and third criteria of Racine case, because the parties have not yet entered into a full agreement to defer the retaliation claims to arbitration the Motion to Defer must be denied as being premature. In any event, as Respondent's Answer clearly shows that this is a contested case, Respondent's Motion to Dismiss must be denied except as otherwise granted herein.

Dated at Oshkosh, Wisconsin this 23rd day of September, 1994.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner