

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

KIRK W. KAUERS,

Complainant,

vs.

AFSCME COUNCIL 24; AFSCME LOCAL 3777;  
AND MIKE McDERMOTT,

Respondents.

Case 401

No. 52878 PP(S)-246

Decision No. 28492-B

Appearances:

Mr. Kirk W. Kauers, 4939 Indian Hills Drive, Racine Wisconsin 53406, for the Complainant.

Mr. Bruce M. Davey, Lawton & Cates, S.C., Attorneys at Law, 214 West Mifflin Street, P.O. Box 2965, Madison, Wisconsin 53701-2965, for AFSCME Council 24 and AFSCME Local 3777.

Mr. Mike McDermott made no appearance.

FINDINGS OF FACT, CONCLUSION OF LAW  
AND ORDER DISMISSING COMPLAINT

On July 10, 1995, the Complainant filed a complaint of unfair labor practices alleging that the Respondents had committed a "breach of duty of fair representation by union." In a letter dated July 12, 1995, issued to the President of AFSCME Council 24, the President of AFSCME Local 3777 and the Complainant, the Commission, through its General Counsel, stated:

The parties have a right to a hearing within 40 days of the filing of the complaint. If you or the Complainant(s) do not wish to have settlement discussions delay the scheduling of a hearing, you or the Complainant(s) should write me and ask that a hearing be scheduled. If I do not receive such a written request, it will be assumed that all parties agree that a hearing should not be scheduled until settlement efforts have ended.

No. 28492-B

On July 28, 1995, Counsel for AFSCME Council 24 and AFSCME Local 3777 filed a motion to dismiss the complaint. On August 10, 1995, the Commission issued a copy of the complaint to Mike McDermott, and appointed James W. Engmann, then a member of its staff, to act as Examiner. In a letter to the Complainant dated August 10, 1995, Examiner Engmann stated:

...

Also please find enclosed a copy of the Motion to Dismiss filed by the Respondents, . . . I have also enclosed a copy of the motion for Mr. McDermott.

If you choose to respond to the Motion to Dismiss, please do so in writing addressed to the undersigned. Said response must be received in this office on or before September 11, 1995.

On or after September 12, 1995, I will either rule on the Motion to Dismiss or schedule said Motion for hearing.

The Commission received no response to this letter. Due to the resignation of Examiner Engmann, the Commission, on September 20, 1995, substituted Richard B. McLaughlin, a member of its staff, for Examiner Engmann. In a letter to the parties dated September 20, 1995, I stated:

...

I do not know what, if any, discussion preceded Examiner Engmann's letter of August 10, 1995. Rather than attempt to determine how that deadline came to be set, I will afford any party wishing to file written argument the opportunity to do so. Please file your written argument postmarked not later than October 13, 1995.

I stress to Mr. Kauers that the assertion that the complaint was not timely filed is jurisdictional. This means the complaint can be dismissed without an evidentiary hearing. Your decision to file or not to file written argument should take this into account.

If any of you have any questions, please contact me.

I received no response to this letter.

## FINDINGS OF FACT

1. Kirk Kauers, 4339 Indian Hills Drive, Racine, Wisconsin 53406, filed with the Commission, on July 10, 1995, a complaint of unfair labor practices against AFSCME Council 24, AFSCME Local 3777 and Sgt. Mike McDermott. His complaint reads thus:

December 08 1994

On January 21, 1994, I received written notification from Capt. M. Canziani for two (2) pre-disciplinary hearings for potential violation of DOC work rule #13 - improper notice category A to be heard on January 25, 1994.

These hearings were heard by Lt. P. Pausma on January 25, 1994. I designated Sgt. Mike McDermott as my union representative. Prior to my meeting with Lt. Pausma, I met with Sgt. McDermott and explained to him that the reason for my first alleged violation for improper notice was due to the fact that my car had broken down on the way to work and I had to walk back home, hence the late call in. I produced a bill from Manro Auto Group in Kenosha, WI to verify that my fuel pump went out and my car was indeed inoperable.

On my second alleged violation for improper notice, my clock read 5:29 A.M. when I reached the switchboard officer. It took several minutes for the officer to locate a supervisor and transfer the call. The supervisor on duty was Lt. S. Walker. I explained to him that I had injured my back lifting weights the previous night and it was extremely stiff when I woke up and I would be unable to make it into work. Lt. Walker took the information and hung up. At no time during our conversation did Lt. Walker inform me that I was calling in late which, from my understanding, is required.

These explanations were also given to Lt. Pausma at the pre-disciplinary hearings. He was especially dumbfounded on why I was written up for the second violation. He couldn't understand why Lt. Walker wrote me up without informing me that I was calling in late (which according to my clock I wasn't). He told me he couldn't see how I could be disciplined for this and didn't seem to think this would stick. Sgt. McDermott agreed. Lt. Pausma also said that he would

reccomend (sic) that this violation be dropped.

Sgt. McDermott approached me at post several days later and pulled me aside and told me "There's no way they can walk you out." "I checked your file and they missed steps in the disciplinary process." "Even if they walk you out, we'll get you back." I asked him if this was for sure and Sgt. McDermott assured me that it was for sure. Keep in mind, when I received my termination letter, I seem to have gone from a 3 day suspension to a 30 day suspension. What happened to the 1, 5 and 10 day suspensions? It is my understanding that suspensions must be handed down in this sequence.

On Saturday February 5, I received my termination letter upon arrival to work. That same day I tried to contact Sgt. McDermott at home and inform him of the situation but was told by his roommate that he was out of town for the weekend.

I finally got in contact with Sgt. McDermott on Tuesday, February 8, 1994 and told him of the situation. He told me that a grievance would be filed on my behalf. I kept in contact with McDermott on a continuous basis after Feb. 8 and he informed me that the grievance is on file and I now have to wait for an arbitrator to come down and conduct a hearing. Sgt. McDermott told me that this arbitrator only comes down 4 times a year and had just come approximately 2 weeks prior to my termination so I would have to wait it out until he or she came down again. McDermott also gave me Cindy Manloves (sic) phone number so I could contact her, if necessary. This number proved to be a wrong number.

It wasn't until another RCI employee, Sgt. Rudy Renteria, a former union steward, informed me that he didn't think a grievance was filed on my behalf, that I decided to dig deeper to see what was going on. I had to write the union president (Local 3777) Rick Gondert in order to obtain Cindy Manlove's correct phone number because Sgt. McDermott was not returning any phone calls. I also received Marty Beil's number from Gondert. I tried unsuccessfully to contact both for several weeks by phone, and mail to Mr. Beil's office, finally, Cindy Manlove contacted me, and strangely enough, Marty Beil contacted me right after. I was informed by Cindy that no grievance had been filed for me. The excuse given was that I had told McDermott that I would be in contact if I wanted a grievance

filed but I never got back to him. There is no truth to the comment whatsoever. I finally

received in writing on June 21, 1994 a statement from Mr. Beil informing me that no grievance was filed. This written statement by myself is accurate and concise to the best of my knowledge.

Kirk Kauers /s/ 01-01-95

The complaint seeks "immediate return to work with full backpay compensation." Attached to the complaint was a copy of a letter, dated June 23, 1994, from Martin Beil, the Executive Director of AFSCME Council 24, to Kauers which states:

First let me apologize for the delay in responding to you. I needed some research done on your case, and didn't feel comfortable in responding until I had all the information. After doing a thorough check of all records and files, and discussing your situation with Field Representative Cindy Manlove, we have found that no grievance has been filed regarding your termination.

I know that this is not necessarily what you wanted to hear, however it is the case. I would suggest that you talk to Cindy Manlove, . . . regarding specifics. I am sorry to be the bearer of bad news.

2. On July 28, 1995, Bruce M. Davey filed the following letter with the Commission:

This office represents AFSCME Council 24 and AFSCME Local 3777 in the above captioned matter. It is apparent from the contents of the complaint that the complaint is barred by the statute of limitations. Accordingly, I am enclosing a Motion to dismiss. I do not intend to file a brief.

. . .

The enclosed Motion to Dismiss states:

COMES NOW the Respondents AFSCME Council 24 and AFSCME Local 3777 by their attorneys Lawton & Cates, S.C. and Bruce M. Davey and moves to dismiss the complaint on the grounds

that the complaint was filed more than one (1) year after the occurrence of the conduct alleged to constitute an unfair labor practice and therefore the complaint is barred by the statute of limitations.

3. The July 10, 1995 complaint contains no allegation of a specific act or unfair labor practice occurring within the one-year period preceding the filing of the complaint.

#### CONCLUSION OF LAW

The Complainant has no right "to proceed under this section" within the meaning of Sec. 111.07(14), Stats. The Commission has, therefore, no jurisdiction to hear the merits of the July 10, 1995 complaint.

#### ORDER 1/

---

1/ Any party may file a petition for review with the Commission by following the procedures set forth in Sec. 111.07(5), Stats.

Section 111.07(5), Stats.

(5) The commission may authorize a commissioner or examiner to make findings and orders. Any party in interest who is dissatisfied with the findings or order of a commissioner or examiner may file a written petition with the commission as a body to review the findings or order. If no petition

The July 10, 1995 complaint is dismissed.

Dated at Madison, Wisconsin, this 8th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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

---

1/ (footnote continued from Page 6)

such time. If the findings or order are set aside by the commissioner or examiner the status shall be the same as prior to the findings or order set aside. If the findings or order are reversed or modified by the commissioner or examiner the time for filing petition with the commission shall run from the time that notice of such reversal or modification is mailed to the last known address of the parties in interest. Within 45 days after the filing of such petition with the commission, the commission shall either affirm, reverse, set aside or modify such findings or order, in whole or in part, or direct the taking of additional testimony. Such action shall be based on a review of the evidence submitted. If the commission is satisfied that a party in interest has been prejudiced because of exceptional delay in the receipt of

---

is filed within 20 days from the date that a copy of the findings or order of the commissioner or examiner was mailed to the last known address of the parties in interest, such findings or order shall be considered the findings or order of the commission as a body unless set aside, reversed or modified by such commissioner or examiner within

(footnote continued on Page 7)



a copy of any findings or order it may extend the time another 20 days for filing a petition with the commission.

**This decision was placed in the mail on the date of issuance (i.e. the date appearing immediately above the Examiner's signature).**

DEPARTMENT OF EMPLOYMENT RELATIONS

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,  
CONCLUSION OF LAW AND ORDER DISMISSING COMPLAINT

BACKGROUND

The July 10, 1995 complaint does not specifically cite any statute violated by Respondents, but alleges a "breach of duty of fair representation by union." The Commission addresses such a general allegation under Sec. 111.84(2)(a), Stats. 2/ Section 111.84(4), Stats., states that "(a)ny controversy concerning unfair labor practices may be submitted to the commission as provided in s. 111.07." Respondents' motion concerns the application of Sec. 111.07(14), Stats.

DISCUSSION

Respondents' Motion to Dismiss is governed by Chapters 111 and 227. Section 111.84(2)(a), Stats., governs allegations of a breach of the duty of fair representation. Through the operation of Sec. 111.84(4), Stats., Sec. 111.07, Stats., governs the procedures by which those allegations are to be heard. Chapter 227 states the framework common to administrative agency proceedings.

Section 227.01(3), Stats., defines a "Contested case" to mean "an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order."

The Commission is an "Agency" under Sec. 227.01(1), Stats., thus making this proceeding an "agency proceeding." To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. The complaint seeks to return Kauers to the position he was discharged from. His interest in the position is "substantial," and is, as Respondents' motion demonstrates, "controverted by another party." Hearing of alleged prohibited practices is mandated by Sec. 111.07(2)(a), Stats. Thus, this matter arguably constitutes a contested case.

---

2/ See Local 950, International Union of Operating Engineers, Dec. No. 21050-C (WERC, 7/84).

The right to a hearing under Sec. 111.07(2)(a), Stats., is not, however, unlimited. Section 111.07(14), Stats., limits that right thus:

The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

Even though Chapter 227 does not provide a summary judgment procedure, the jurisdictional effect of a statute of limitations has been recognized by the Commission <sup>3/</sup> and by the Attorney General:

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases . . .

<sup>4/</sup>

The issue posed by the motion is whether the complaint can be read to allege any act or unfair labor practice falling within the one year "right to proceed" set by Sec. 111.07(14), Stats.

Reading the complaint in the light most favorable to the Complainant, <sup>5/</sup> the last act or specific unfair labor practice alleged against the Union dates from Beil's June 23, 1994 letter to Kauers. The complaint was filed with the Commission on July 10, 1995. This filing is beyond the one-year period mandated by Sec. 111.07(14), Stats. As noted above, the effect of Sec. 111.07(14), Stats., is jurisdictional. The complaint has, accordingly, been dismissed.

Dated at Madison, Wisconsin, this 8th day of December, 1995.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

3/ See, for example, AFSCME, Council 24, Wisconsin State Employees Union, Dec. No. 21980-C (WERC, 2/90), and State of Wisconsin, Department of Employment Relations (DER), Dec. No. 25284-C (WERC, 11/90).

4/ 68 OAG 31, 34 (1979). The opinion letter was requested by the Wisconsin Real Estate Examining Board and concerned the "denial, limitation, suspension or revocation of licenses."

5/ See Racine Unified School District, et al., Dec. No. 27982-B (WERC, 6/94).

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