STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GERHARDT J. STEINKE,

Complainant,

vs.

MILWAUKEE AREA TECHNICAL COLLEGE, ET AL.,

Respondents.

Case 456
No. 53078 MP-3067
Decision No. 28562-B

Appearances:

Mr. Gerhardt J. Steinke, 4692 West Bernhard Place, Milwaukee, Wisconsin 53216, appearing pro se.

Michael, Best & Friedrich, Attorneys at Law, by Mr. John A. Busch, 100 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4108, appearing on behalf of certain named Respondents.

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, by Mr. Timothy E. Hawks, P. O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of certain named Respondents.

Godfrey & Kahn, S.C., Attorneys at Law, by Mr. Robert W. Burns, 333 Main Street, Suite 600, P. O. Box 13067, Green Bay, Wisconsin 54307-3067, appearing on behalf of certain named Respondents.

vonBriesen & Purtell, S.C., Attorneys at Law, by Mr. Brent P. Benrud, 411 East Wisconsin Avenue, Suite 700, Milwaukee, Wisconsin 53202-4470, appearing on behalf of certain named Respondents.

ORDER GRANTING MOTIONS TO DISMISS

Gerhardt J. Steinke, hereinafter referred to as the Complainant, on August 11, 1995, filed a complaint with the Wisconsin Employment Relations Commission naming 85 Respondents and claiming violations within the meaning of Secs. 111.70(3)(a) and (b) of the Municipal Employment Relations Act. On October 13, 1995, the Complainant filed an amended complaint. On

October 18, 1995, the Commission appointed Lionel L. Crowley, a member of its staff, to act as Examiner to make and issue Findings of Fact, Conclusions of Law and Order pursuant to Sec. 111.07(5), Stats. Respondents by Counsel filed Motions to Dismiss the complaint on September 21, 1995, and the amended complaint on October 26, 1995, October 30, 1995 and November 1, 1995. The Complainant responded to said Motions by November 17, 1995. The Examiner, having considered the record and the arguments of the parties, concludes that the Motions to Dismiss the complaint, as amended, be granted.

NOW, THEREFORE, it is

ORDERED 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 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 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 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).

1. The Motions to Dismiss are granted and the complaint, as amended, is hereby dismissed.

2. The Complainant is assessed costs in the amount of $690.80 payable to the Commission.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner

MILWAUKEE AREA TECHNICAL COLLEGE

MEMORANDUM ACCOMPANYING
ORDER GRANTING MOTIONS TO DISMISS

The Respondents in this matter have all filed Motions to Dismiss, which Motions are opposed by the Complainant. Essentially the Motions to Dismiss are based on a lack of timeliness, res judicata and collateral estoppel, failure to state a claim upon which relief may be granted and lack of subject matter jurisdiction.

The Commission, 2/ with judicial approval, 3/ has authorized examiners to determine pre-hearing motions to dismiss. Such motions can be granted only if a complaint fails to raise a genuine issue of fact or law. The standard appropriate to determining the merit of a pre-hearing motion to dismiss has been stated thus:

> Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. 4/

It is therefore necessary to review the allegations in the complaint. The allegations can be grouped into seven (7) broad areas of conduct alleged to be prohibited practices. There are:

1. Continuing violation;
2. Violation of Public Records Law;
3. Perjury, subornation of perjury and other crimes;

2/ See County of Waukesha, Dec. No. 24110-A (Honeyman, 10/87), aff'd Dec. No. 24110-B (WERC, 3/88).

3/ See Village of River Hills, Dec. No. 24570 (WERC, 6/87), aff'd Dec. No. 87-CV-3897 (CirCt Dane County, 9/87), aff'd Dec. No. 87-1812 (CtApp, 3/88). The procedural history of the case is summarized in Village of River Hills, Dec. No. 24750-B (Greco, 4/88).

4/ Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3.

4. Temporary restraining order;
5. Violation of contract;
6. Commission oversight of arbitrator;
7. Misconduct by the Union.

1. Continuing Violation

The Complainant asserts that the Commission has jurisdiction over the August 8, 1995 complaint under the "Ongoing Violations Doctrine." The Complainant cites no legal authority for such doctrine.

Section 111.07(14), Stats., states:

> 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.

This section is strictly construed. In City of Madison, Dec. No. 15725-B (WERC, 6/79), aff'd, Dec. No. 79-CV-3327 (CirCt Dane, 6/80), the Commission held that a complaint filed 366 days after the act complained of was not timely.

The Commission has adopted the principles of Bryan Mfg. Co. to address the significance of events falling outside of a statutory limitations period. 5/ In that case, the United States Supreme Court addressed two situations which pose the relevant considerations. The Court addressed those situations thus:

> . . . The first is one where occurrences within the . . . limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices. There, earlier events may be utilized to shed light on the true character of matters occurring within the limitations period; and for that purpose (the statute of limitations) ordinarily

5/ See CESA No. 4, Dec. No. 13100-E (Yaffe, 12/77), aff'd Dec. No. 13100-G (WERC, 5/79), aff'd Dec. No. 79CV316 (CirCt Barron County, 3/81). See also School District of Clayton, Dec. No. 20477-B (McLaughlin, 10/83), aff'd by operation of law, Dec. No. 20477-C (WERC, 11/83); Moraine Park Technical College, Dec. No. 25747-B,C (McLaughlin, 3/89), aff'd Dec. No. 25747-D (WERC, 1/90).

> does not bar such evidentiary use of anterior events. The second situation is that where conduct occurring within the limitations period can be charged to be an unfair labor practice only through reliance on an earlier unfair labor practice. There the use of the earlier unfair labor practice is not merely "evidentiary," since it does not simply lay bare a putative current unfair labor practice. Rather, it serves to cloak with illegality that which was otherwise lawful. And where a complaint based upon that earlier event is timebarred, to permit the event itself to be so used in effect results in revising a legally defunct unfair labor practice. 6/

As Examiner McLaughlin stated in Moraine Park Technical College, Dec. No. 25747-C (8/89):

> The Bryan analysis, read in light of the provisions of Secs. 111.70(4)(a) and 111.07(14), Stats., requires two determinations. The first is to isolate the "specific act alleged" to constitute the prohibited practice. The second is to determine whether that act "in and of (itself) may constitute, as a substantive matter" a prohibited practice.

In the instant case, the complaint fails to allege a "specific act" within the one-year statute of limitations which constitutes in an of itself a prohibited practice and under the Bryan analysis, evidence of the Complainant's prior employment history and prior acts of Respondents are time barred.

For example, Respondents Daniel Miller and Michael Morse have submitted affidavits indicating that they acted as defense counsel in cases filed by the Complainant which have all been decided prior to August 8, 1994, except for a Seventh Circuit Appeal. The Complainant simply asserts that "The 'Time Barred' Argument Has No Merit" and that his claim against Morse and Miller originates in "actual malice" statements and Morse's falsely promised access to Sec. 38.10(1) committee and MATC records. Nothing is alleged about any specific act that constitutes a prohibited practice which occurred within one year of the filing of the complaint.

With respect to every other Respondent, the complaint also fails to allege the required

---

6/ Local Lodge No. 1424 v. National Labor Relations Board (Bryan Mfg. Co.), 362 US 411 (1960), 45 LRRM 3212, at 3214-3215.

"specific act" that constitutes a prohibited practice by any Respondent within the one-year statutory period. Therefore, it must be concluded that the complaint is not timely and the Commission has no jurisdiction to act.

2. Violation of Public Records Law

The Commission's jurisdiction is limited to enforcement of the statutes arising under the Municipal Employment Relations Act. As stated by the Commission:

> MERA was not enacted to grant the Commission an unlimited authority to generally oversee an employer's employment relations decisions. Rather, MERA grants the Commission a limited authority to review contested cases raising issues of employe exercise of "lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection." 7/

In this regard the Commission has no independent authority to enforce the Public Records Law. 8/ Specifically, it has no independent authority to enforce Secs. 38.12(4), 19.21(6) and 19.32(2), Stats.

3. Perjury, Subornation of Perjury and Other Crimes

The Complainant alleges violations of Secs. 111.01, 111.04 and 111.06, specifically 111.06(1)(L), Stats. Although the Commission does have authority to enforce Secs. 111.01, 111.04 and 111.06, Stats., these apply to a private sector employer or its agents. Section 111.06(1)(L), Stats., of the Wisconsin Employment Peace Act makes it an unfair labor practice for a private sector employer or its agents "to commit a crime or misdemeanor in connection with any controversy as to employment relations." The Complainant alleges no facts that support a finding that any of the Respondents named in the complaint meet the definition of an "employer" set forth in Sec. 111.03(7) of the Wisconsin Employment Peace Act. MERA contains no language paralleling that in Sec. 111.06(1)(L). Thus, any allegations with respect to crimes such as perjury, subornation of perjury and misconduct in public office are not violations of Sec. 111.70(3)(a), Stats., or any other provision found in MERA. 9/

7/ Milwaukee Public Schools, Dec. No. 20005-B (WERC, 2/84).

8/ Moraine Park Technical College, Dec. No. 25747-B (McLaughlin, 3/89) aff'd Dec. No. 25747-D (WERC, 1/90).

9/ See Onalaska School District, Dec. No. 28243-A (Gratz, 6/95) aff'd by operation of law

In addition, the Complainant has alleged various legal ethics violations. Again, the Commission has no jurisdiction over these as any violations are within the sole jurisdiction of the Wisconsin Supreme Court, Board of Bar Examiners.

4. Temporary Restraining Order

The Complainant has asserted that certain of the Respondents, by seeking and obtaining the TRO, have committed prohibited practices and part of the remedy sought by Complainant is that the TRO be lifted.

The Commission does not have concurrent jurisdiction with the courts on a temporary restraining order. Section 111.07(1), Stats., provides that "nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction." A TRO is equitable relief and only a court may grant it or modify it and the Commission cannot provide such relief. Even if the Commission had concurrent jurisdiction, it has held as follows:

> It is the Commission's policy not to assert its jurisdiction over issues which may also have been submitted to a court, even though the Commission may have primary jurisdiction over the issue. It is for the court to decide whether to honor the Commission's primary jurisdiction. 10/

This statement of Commission policy has been incorporated into the Supreme Court's application of the primary jurisdiction doctrine. 11/ With respect to an injunction, the policy has been upheld by the Court of Appeals. 12/ Thus, the TRO is reserved to the Courts for determination and the Commission under its policy will not assert jurisdiction over the issues.

5. Violation of Contract

Dec. No. 28243-B (WERC, 7/95).

10/ Pierce County and William McEwen, Dec. No. 16067 (WERC, 1/78) at 2.

11/ McEwen v. Pierce County, 90 Wis.2d 256 (1979).

12/ Madison Teachers, Inc. v. Madison Metropolitan School District, Case No. 93-3323, (CtApp. IV, Oct. 19, 1995).

The Complainant has alleged violations of Sec. 111.70(3)(a)5, Stats., and claims that the Commission has jurisdiction over these violations and that remedies are not mutually exclusive to arbitral jurisdiction. 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. 13/ The rationale for this policy is to give full effect to the parties' agreed-upon procedures for resolving contractual disputes. The complaint alleges that arbitration over the grievance filed by Complainant began before Arbitrator Richard U. Miller on September 18, 1992, with the last day of hearing on August 18, 1994. Clearly, the matters of contract violation are before Arbitrator Miller and Complainant cannot now assert a violation of Sec. 111.70(3)(a)5, Stats., as this appears an attempt to get a second bite of the apple and the Commission policy is to defer such matters to the Arbitrator. Thus, the Examiner will not assert the Commission's jurisdiction over any Sec. 111.70(3)(a)5, Stats., claims.

6. Commission Oversight of the Arbitrator

The Complainant asserts that public policy requires that the Commission monitor arbitration procedures rooted in the collective bargaining agreement. There is no public policy or other statutory provision that authorizes the Commission to monitor an arbitrator selected by the parties to resolve a dispute. Chapter 788 of the Wisconsin Statutes provides the procedures governing arbitration and oversight of an arbitrator. Nothing in Chapter 788, Stats., provides for monitoring of the arbitrator by the Commission, particularly while the arbitrator has jurisdiction and has not rendered an award.

7. Misconduct by the Union

The Complainant asserts various allegations by the Union such as keeping trustees in the dark and certain persons being "cult figures." Additionally, the Complainant suggests a sweetheart deal between Shansky and various agents of the Respondent MATC because of the hiring of Shansky's wife.

As noted earlier, none of these allegations are timely. Secondly, the alleged relationship between Shansky and agents of MATC does not state a cause of action under Sec. 111.70, Stats. 14/ If the allegations were timely and were for unfair representation, only the labor organization which

---

13/ 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).

14/ Local 2486 of AFSCME, Dec. No. 27378-A (Engmann, 10/92) aff'd by operation of law Dec. No. 27278-B (WERC, 11/92).

is Complainant's exclusive bargaining representative may be sued. 15/ Thus, the WFT, the AFT, Mr. Shanker, and Mr. Kowalski would be dismissed as Respondents. Thus, the allegations against the Union, its officers and agents must be dismissed for the above reasons.

15/ State of Wisconsin, Dec. No. 28208-A (Engmann, 12/94).

Conclusion

The Motions to Dismiss have been granted for the above reasons, namely, the complaint is not timely and the Commission lacks jurisdiction over the various alleged statutory violations and alleged ethics violations. Given these reasons, the undersigned did not feel it necessary to address the res judicata and collateral estoppel arguments of the Respondents.

The undersigned has assessed costs that the Commission incurred in serving the complaint and amended complaint on the individual Respondents because the complaint, as amended, even when construed most favorably to the Complainant, is frivolous and naming as individual Respondents those who are employes, agents or officers of the non-individual entities merely increased the Commission's costs of serving them for no defensible reason.

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

.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Lionel L. Crowley /s/
Lionel L. Crowley, Examiner