

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GARY L. OLDS,

Complainant,

vs.

LOCAL 309, AFSCME, AFL-CIO, and
CITY OF STEVENS POINT,

Respondents.

Case 99

No. 53890 MP-3147

Decision No. 28708-A

Appearances:

Mr. Gary L. Olds, an individual residing at 2501 Nebel Street, Lot 704, Stevens Point, Wisconsin 54481, on behalf of himself.

Shneidman, Myers, Dowling & Blumenfield, Attorneys at Law, 217 South Hamilton Street, P.O. Box 2155, Madison, Wisconsin 53701-2155, by Mr. Aaron N.

Halstead, on behalf of Local 309, AFSCME, AFL-CIO.

Mr. Louis J. Molepske, City Attorney, 1515 Strongs Avenue, Stevens Point, Wisconsin 54481, on behalf of the City of Stevens Point.

FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDERS REQUIRING COMPLAINANT TO COMPLY WITH
ERC. 12.02(1), WISCONSIN ADMINISTRATIVE CODE AND
DENYING MOTIONS TO DISMISS

On February 27, 1996, Gary L. Olds, an individual residing in the State of Wisconsin, filed a complaint of prohibited practices with the Wisconsin Employment Relations Commission wherein he alleged that the City of Stevens Point, Wisconsin had violated his rights under a collective bargaining agreement between the City of Stevens Point and Local 309, AFSCME, AFL-CIO, in violation of Sec. 111.70(3)(a)5, Stats., and that thereafter, Local 309, AFSCME, AFL-CIO, failed in its duty to fairly represent him in violation of Sec. 111.70(3)(b)1, Stats. Thereafter, the Commission appointed David E. Shaw, a member of its staff, as Examiner to make and issue Findings of Fact, Conclusions of Law in the matter.

On April 29, 1996, Local 309, AFSCME, AFL-CIO filed a motion to dismiss the complaint on the basis that the complaint was not sworn to before a person authorized to

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administer oaths or acknowledgments, contrary to the requirements of ERC 2.01, Wisconsin Administrative Code. On May 6, 1996, Olds responded objecting to the motion and asking to correct the error. On May 6, 1996, the City of Stevens Point joined in Local 309's motion to dismiss and also moved to dismiss the complaint on the basis that it fails to allege a cause of action under either Sec. 111.70(3)(a)5 or 111.70(3)(b)1, Stats. On May 10, 1996, Local 309 responded, joining in the City's motion to dismiss. 1/

The undersigned, having considered the pleadings of the parties, their arguments in support of their respective positions and the applicable law, and being satisfied that the motions to dismiss should be denied, now makes and issues the following Findings of Fact, Conclusions of Law and Orders.

FINDINGS OF FACT

1. Gary L. Olds, an individual residing in Stevens Point, Wisconsin filed an unverified complaint of prohibited practices with the Commission on February 27, 1996, wherein, in relevant part, it is alleged:

2. What section(s) of the statute have been violated:

111.70 "3" "A" "5"

111.70 "3" "B" 1

3. What remedy do you seek?

1. The four main Officers of Local 309 resign and not hold office for the next 5 years.

2. For all the bad paper work in my file, That Management could use against me to fire me. I would like a \$31,000.00 cash settlement from Local 309 to cover 1 year lost wages if at anytime Management decides to fire me. Things are still being done against me by Management and Local 309 still up to this day.

...

1/ Responses to the City's motion to dismiss were due postmarked no later than May 17, 1996. As of the date of this Order, the Examiner had not received a response from Complainant.

Question 1 Fact which constitute alleged unfair or prohibited practices

A. 1) On July 28th 1995, I was assigned to work in the City Pit instead of the Streets by union contract I am the second man on Loader Position, the first man was not at work. I should have been on the Streets working instead Management put me in the Pit. I filed a grievance and I won. The City understood that Gary is second on the Streets, this assignment was made in error during the Managers absent.

A. 2) Then on September 7th 1995, or around that date, Management assigned another employee on Streets instead of me. Management says no violation of contract, section 2 Managements right, but on August 1st, 1995, Management stated that they where in the wrong and that I am second man on the Streets.

A. 3) On August 11th 1995, I filed second step grievance or written grievance if you will look at the dates. If you look at A3 the dates are all past due from the time allowed.

So I feel that on July 28th 1995 that Management said they where wrong and I was right. On September 7th 1995 they changed there minds (Management) because, it all depends on who is the Manager that day. When it's against Head Manager he's not wrong, but when it is the Assistant Manager, he's wrong. The Head Manager made the statement to the steward "Keep writing up the Assistant Manager then I can get him Fired". These two people have a problem, so why should I get stuck in the middle. When you look at A3 written you can see the union doesn't follow up and the union said not to take it any further. I feel this is a good grievance because Management feel they can change my job position from month to month. When you read the next grievances you will see what Management and the Union are trying to doing by putting all these reports in my file to make me look bad.

B1) On October 9 1995, I (Gary Olds) broke a tail light on my loader #831. I was told to make out a accident report. I don't see why I have to make out a accident report, because on September 5 1995, I broke a yellow light and bent a cab of a truck. The accident reports I was filing out where forms for damages to City vehicle for Insurance claims with other private vehicle on these claims not repair

slips for the mechanics, When I had to make out a accident report on the taillight I had enough. I have been getting harassed before this. So I did Step 1 grievance I explained all the things I have been harassed on. I got there answer back on Step 1 on B2 was management's answer I then did a written grievance on B1. Then my answer came back on B3 from Management Step 2 harassment on time card. On B4 harassment accident report read B4 & B5. On B4 management said they apologized but, on B5 & B4 they said no violation of contract but, still apologized. On B6 they had on timecard which is no grievance. I asked to see someone else's timecard and they put this in my files. On B7 they sent this to the union on timecards. People can in late or leave early and mark down on their timecards as 8 hours and they weren't there 8 hours. The time keeper would call two or three times on truck radios to correct there timecards of there mistakes. They wouldn't get wrote up. On B8 Management said they use B7 for discipline action. Nobody has this in there records except me. Management is telling other employees things on vacation and other things I supposedly said. Management is also telling employee to go vote to stop grievances, only my grievances. I feel this is harassment by Management. When you file harassment charges you don't separate and go one by one.

Sorry this is so confusing, but that's the way my Union and Management does things. Dates don't match up. If you look at B9 I had to rewrite my grievance it's the same grievance as B1. If you look at the grievance where they apologize then they said they didn't apologize.

Sorry this is so confusing it is much easier to explain in person.

Gary L. Olds

2. On April 29, 1996, Respondent Local 309, AFSCME, AFL-CIO, filed a motion to dismiss Olds' complaint on the basis that it was not signed and sworn to before a person authorized to administer oaths and acknowledgements as required by ERC 2.01, Wisconsin Administrative Code.

3. On May 6, 1996, Olds responded in opposition to Local 309's motion to dismiss and requested that he be allowed to correct the error and refile the complaint.

4. Also on May 6, 1996, Respondent City of Stevens Point, Wisconsin, joined in Local

309's motion and also moved to dismiss the complaint on the basis that it fails to allege a cause of action under either Sec. 111.70(3)(a)5, Stats., or Sec. 111.70(3)(b)1, Stats., and does not seek relief against the City.

5. On May 10, 1996, Local 309 joined in the City's motion to dismiss, filing supporting recitation of case law.

6. Neither Local 309, AFSCME, AFL-CIO, nor the City of Stevens Point have alleged that they have in any way been prejudiced by the Complainant's failure to meet the requirements of ERC. 12.02(1), Wis. Adm. Code.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. ERC 12.02(1), Wis. Adm. Code requires that the original complaint be signed and sworn to before any person authorized to administer oaths or acknowledgements. Sec. 111.07, Stats., made applicable by Sec. 111.70(4)(a), Stats., does not statutorily provide for the aforesaid requirement of ERC 12.02(1), Wis. Adm. Code, and as ERC 12.02(5), Wis. Adm. Code, permits the amendment of a complaint prior to hearing, during the hearing and any time prior to the issuance of an order based upon the complaint, it is appropriate to permit the Complainant to file an amended original complaint in this matter that meets the requirements of ERC 12.02(1), Wis. Adm. Code.

2. The complaint filed by Olds on February 27, 1996 alleges facts which, if proved, provide a basis for granting relief under Sec. 111.70(3)(b)1 and Sec. 111.70(3)(a)5, Stats.

Based upon the foregoing Findings of Fact and Conclusions of Law, the Examiner makes and issues the following

ORDER

1. The Complainant, Gary L. Olds, is hereby given until the date set for hearing in this matter, June 6, 1996, to file an amended original complaint that has been signed and sworn to before a notary public or other person authorized to administer oaths or acknowledgements, so as to meet the requirements of ERC 12.02(1), Wis. Adm. Code.

2. The motion of Local 309, AFSCME, AFL-CIO, to dismiss the complaint is hereby denied.

3. The motion of the City of Stevens Point to dismiss the complaint is hereby denied.

Dated at Madison, Wisconsin, this 21st day of May, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner

LOCAL 309, AFSCME, AFL-CIO
CITY OF STEVENS POINT

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDERS REQUIRING COMPLAINANT TO COMPLY WITH
ERC. 12.02(1), WISCONSIN ADMINISTRATIVE CODE AND
DENYING MOTIONS TO DISMISS

Respondent Local 309, AFSCME, AFL-CIO, hereinafter the Union, filed a motion to dismiss the complaint on the basis that the original was not signed and sworn to before a person authorized to administer oaths or acknowledgements as required by ERC 2.01, Wis. Adm. Code. In support of its motion, the Union cites Kellner v. Christian, 197 Wis. 2d 183 (1995). ERC 2.01, ERC 12.02(1) and ERC 22.02(1), Wis. Adm. Code all provide for that same requirement. While the Union cites ERC 2.01, that provision of the Code pertains to the Wisconsin Employment Peace Act, and the Examiner has treated the motion under ERC 12.02(1) Wis. Adm. Code, pertaining to the Municipal Employment Relations Act.

The issue raised by the Union's motion has been addressed previously by other examiners and by the Commission. In State of Wisconsin, Dec. No. 15716-B (Davis, 4/78), aff'd Dec. No. 17516-C (WERC, 10/79), the Examiner in that case held:

It should initially be noted that there is no statutory requirement that a complaint alleging violation of the State Employment Labor Relations Act be "sworn to before any person authorized to administer oaths or acknowledgements." Inasmuch as the July 28, 1977 complaint met all of the jurisdictional requirements of Section 111.07(2)(a) and was filed less than one year from the date of the alleged statutory violation, it is concluded that the filing of said complaint was sufficient to toll the statute of limitations. Furthermore, while Wis. Admin. Code Section ERB 22.02(1) does require that a complaint be verified in the above-quoted manner, and the July 28, 1977 complaint did not meet this procedural requirement, ERB 22.02(5)(a) allows for the amendment of a complaint prior to or during the hearing. In the instant situation where Complainants amended their complaint prior to the hearing to bring it into compliance with ERB 22.02(1) and Respondent made no showing that it was in any way prejudiced by the original complaint's non-compliance with ERB 22.02(1), the Examiner concludes that Respondent's motion to dismiss must be denied.

In a more recent decision, the Commission upheld an examiner's reliance upon the above-

cited case:

We first examine the State's contention that the Examiner erred by failing to dismiss the complaint because it was not verified to comply with ERB 22.02(1) until the statute of limitations had expired.

In State of Wisconsin, Dec. No. 15716-B (Davis, 4/78), aff'd in pertinent part Dec. No. 17516-C (WERC, 10/79), the Commission concluded the filing of a complaint which was signed but not notarized by Complainant's attorney was sufficient to toll the statute of limitations. The Commission further concluded that where the complaint was subsequently amended to include the verification, and no prejudice had been established as to the original complaint's noncompliance with ERB 22.02(1), dismissal was not appropriate.

The Examiner properly applied the holding of State of Wisconsin to the instant complaint. The absence of a verification does not deprive the Commission of jurisdiction over the complaint and is sufficient to toll the statute of limitations pending compliance with the requirements of ERB 22.02(1).

State of Wisconsin, Dec. No. 27365-C (WERC, 8/94). Unlike the case cited by the Union in support of its motion, there is no statutory requirement that the complaint be verified. There having been no showing of prejudice by either of Respondents based upon Complainant's failure to have met the requirements of ERC 12.02(1), Wis. Adm. Code, the Examiner has deemed it appropriate under the above case law to permit the Complainant to file an amended original complaint that meets the requirements of ERC 12.02(1) that the complaint be signed and sworn to before any person authorized to administer oaths or acknowledgements.

The Respondent City of Stevens Point, hereinafter the City, has filed a motion to dismiss asserting that the complaint fails to allege a cause of action under either Sec. 111.70(3)(a)5, Stats., or Sec. 111.70(3)(b)1, Stats., and that the complaint seeks no relief against the City. The Union joins in the City's motion and cites the decision of the Wisconsin Court of Appeals in Gray v. Marinette County, et al, No. 95-1906 FT (1996), in support of the motion.

The following standard has been consistently applied in deciding a pre-hearing motion to dismiss a complaint:

Because of the drastic consequences of denying an evidentiary hearing, 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. 2/

Contrary to the City's assertion, the complaint, along with the supporting attachments, alleges that the City has violated Complainant's rights under the applicable collective bargaining agreement by not recognizing his seniority in making assignments to street work and by issuing him a warning for not properly filling out his time card. Sec. 111.70(3)(a)5, Stats., provides that it is a prohibited practice for a municipal employer:

5. To violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employes, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement or to accept the terms of such arbitration award, where previously the parties have agreed to accept such award as final and binding upon them.

Hence, the complaint has alleged a cause of action under the Municipal Employment Relations Act. With regard to the relief sought in the complaint, while it does not specifically request relief against the City, Sec. 111.07(4), Stats. 3/ provides, in relevant part, that the Commission may in its final order "require the person complained of to cease and desist from the unfair labor practices found to have been committed,. . .and require the person to take such affirmative action. . .as the Commission deems proper." Thus, the Commission is not bound by the Complainant's requested relief in fashioning an appropriate remedy.

With regard to the allegations concerning the Union and its officers, liberally construing the complaint's allegations, along with the supporting attachments, it can be read to assert that the Union conspired with the City to interfere with the Complainant's rights under Sec. 111.70(2), Stats. The complaint also asserts that the Union has improperly refused to pursue the Complainant's grievances. Sec. 111.70(3)(b)1, Stats., provides that it is a prohibited practice for a

2/ Unified School District No. 1 of Racine County, Dec. No. 15915-B (Hornstra, with final authority for WERC, 12/77) at p. 3. See also Augusta School District, Dec. No. 27857-A (Shaw, 2/94); and State of Wisconsin, Dec. No. 27365-A (Schiavoni, 12/92).

3/ Made applicable by Sec. 111.70(4)(a), Stats.

municipal employe, individually or in concert with others:

1. To coerce or intimidate a municipal employe in the enjoyment of the employe's legal rights, including those guaranteed in sub. (2).

Thus, liberally construed, the complaint alleges a cause of action under MERA, which if proved, would entitle Complainant to relief. This conclusion distinguishes this case from the pleadings considered by the Wisconsin Court of Appeals in its decision in Gray v. Marinette County, supra.

Based upon the foregoing, the Examiner has denied the respective motions to dismiss the complaint and the parties will proceed to hearing on the matter.

Dated at Madison, Wisconsin, this 21st day of May, 1996.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By David E. Shaw /s/
David E. Shaw, Examiner