STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FELICIANO YNOCENCIO, JR.,
Complainant,

vs.

UNITED AUTO WORKERS LOCAL 72,
Respondent.

Case 1
No. 56679
Ce-2191

Decision No. 29431-A

Appearances:

Mr. Feliciano Ynocencio, Jr., 5210 Admiralty Avenue, Racine, WI 53406, *pro se*.

Mr. George F. Graf, Attorney at Law, Murphy, Gillick, Wicht & Prachthauser, 300 North Corporate Drive, Suite 260, Brookfield, WI 53045, on behalf of the Respondent.

ORDER DENYING MOTIONS TO COMPEL DISCOVERY AND TO DISMISS

The Complainant, Feliciano Ynocencio, Jr., filed a complaint with the Wisconsin Employment Relations Commission on July 17, 1998, alleging that the Respondent, United Auto Workers Local 72, committed unfair labor practices within the meaning of the Wisconsin Employment Peace Act. On August 27, 1998, the Commission appointed Karen J. Mawhinney, a member of its staff, to serve as Examiner and make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07, Stats. The Respondent filed an answer to the complaint on October 1, 1998. The Examiner's attempts to schedule a hearing in 1998 were unsuccessful and the Examiner continued to write the parties on an annual basis regarding the status of the complaint. On June 30, 2000, the Complainant requested discovery materials from the Respondent and made the same request on April 2, 2001. The Respondent requested in February 3, 2000, and April 9, 2001, that the matter should be dismissed for lack

of prosecution. On March 22, 2002, the Complainant filed an Application for Order to Compel Discovery, and on April 26, 2002, the Respondent filed a Motion to Dismiss. Having considered the arguments of the parties, the Examiner makes and issues the following

ORDER

Complainant's Motion to Compel Discovery is denied and Respondent's Motion to Dismiss is denied.

Dated at Elkhorn, Wisconsin, this 21st day of May, 2002.

WISCONSIN EMPLOYEMENT RELATIONS COMMISSION

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

UNITED AUTO WORKERS LOCAL 72

MEMORANDUM ACCOMPANING ORDER DENYING MOTION TO COMPEL DISCOVERY AND MOTION TO DISMISS

The Complainant asked the Respondent to produce all papers, documents, membership files, video tapes, audio tapes, photos, memoranda, notes, correspondence regarding the Complainant and Chrysler Corporation as well as all other materials in its possession regarding the UAW grievance procedure including all materials in the grievance procedure of the Complainant. The Complainant further asked the Respondent for all papers, documents, files, data, video and audio tapes, photos, computer printouts, memoranda, notes and correspondent in its possession regarding the UAW grievance procedure including copies of individual cases initiated by a union member or the union that proceeded to and beyond the third step of the five step grievance process, as well as a complete synopsis of the final disposition in each case from 1975 through the present date. The Complainant also asked for a listing of all administrative and judicial actions brought against the Respondent regarding claims of bad faith or negligence since 1975, as well as a copy of the official bonds and name of the Respondent's insurance carrier and bonds of all elected Local 72 officials.

The Respondent asks that the compliant be dismissed for lack of prosecution. The Respondent recites the facts leading to the instant motion. The Complainant initially asked for a speedy hearing. When the Examiner tried to set up a hearing in October and November of 1998, the Complainant and his attorney were not available. When the Examiner tried again in January and April of 1999 to set up a hearing, the Complainant claimed he was getting a new attorney. The Examiner set the Complainant a WERC booklet in April of 1999, and wrote the parties on January 31, 2000, to seek the status of the case. The Respondent requested dismissal of the case at that time based on the lack of prosecution and the Complainant's failure to cooperate. The next contact came from the Examiner in March of 2001 seeking the parties' positions in the case, and the Respondent again in April of 2001 stated that dismissal for want of prosecution was appropriate. The Complainant asked that the case not be dismissed because he needed information he requested from the Respondent and had not received it. The matter lay dormant for another year until the Examiner asked for the status of the case again in March of 2002, and later advised the Respondent that she was going to entertain Motions of the Complainant's Application for Order to Compel Discovery. The Respondent received a copy of the Complainant's Application in April of 2002.

The Respondent believes that the Complainant has little or no good faith interest in processing this claim and that his complaint contains no facts to support a claim of discrimination and is nothing more than a form of harassment. The Respondent has been subjected to unreasonably delays by the unavailability of the Complainant and his attorney. The request for information asks for clearly irrelevant information. The four-year delay is unconscionable and should be penalized by dismissal of the case for lack of prosecution. The

Respondent further states that the gravamen of the Complaint is that the Union withdrew a grievance before completing all the steps of the grievance process and the complaint fails to list what section of the Wisconsin Statutes has allegedly been violated. The only possible interpretation of the complaint is that the Complainant is claiming that the Respondent violated its duty of fair representation by dropping his grievance. Based on those facts alone, the complaint must be dismissed, as the U.S. Supreme Court has made it abundantly clear in FORD V. HUFFMAN, 345 US 330, that dropping a grievance is within the prerogative of the Union, and the Union is obligated to remove meritless grievances from the procedure. The Respondent also believes that the six-month statute of limitations applies to claims for breach of duty of fair representation under DEL COSTELLO V. TEAMSTERS, 462 US 151.

The Respondent further provides an affidavit of John Drew, President of UAW Local 72, who is aware of the facts of the Complainant's termination from Chrysler. The affidavit states that the Complainant was laid off due to lack of work in 1988 and was recalled in May of 1992. He lost his seniority effective May 19, 1992, for failure to report upon recall, and that he failed to report because he was in a federal prison between August 9, 1991, to May 15, 1997, for conspiracy to sell drugs. Upon his release from prison, the Complainant contacted the Union to see if he could return to work and appeared before the Seniority Restoration Committee on May 30, 1997. His requested for reinstatement was denied, and he asked the Union to file a grievance on his behalf questioning the refusal to reinstate. The Union did so on June 11, 1997, but after holding a grievance hearing, the Union felt it could not prevail on this grievance and withdrew it on July 24, 1997.

The Complainant, in a letter received on May 10, 2002, states that the Union acted in bad faith by not taking his grievance to the third step, that it said that the company does not hire "drug dealers" yet it helped a man who had his own pot farm. The Complainant further states that the recall in 1992 did not apply to him because he was not laid off but was on work related injury leave due to a back injury and was never released to go back to work. The Complainant asks that a hearing be set in this case.

First, the Examiner has rejected the Motion to Compel Discovery because formal discovery is the exception rather than the rule in administrative proceedings. NORTHEAST WISCONSIN TECHNICAL COLLEGE, DEC. NO. 28909-A (NIELSEN, 11/96). A party who has good cause to argue "surprise" may seek an adjournment of the hearing to request a continuation or additional days of hearing. However, the Complainant has not demonstrated a need for pre-hearing discovery and has not given the Examiner any compelling reason to go against the general rule barring pre-hearing discovery. Accordingly, the Complainant's Motion to Compel Discovery is denied.

Secondly, the Examiner has rejected the Motion to Dismiss. 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 must be denied except where no interpretation of the facts alleged would enable the Complainant to relief. RACINE UNIFIED

SCHOOL DISTRICT, DEC. NO. 15915-B (HOORNSTRA, 12/77). The essence of the complaint in this matter is that the Union violated its duty of fair representation by not taking the Complainant's grievance beyond the third step of the grievance procedure. Without more facts, which would be appropriately heard in an evidentiary hearing, the Examiner is unable to determine whether dismissal is appropriate or not. Accordingly, the Motion to Dismiss is denied. The timeliness of a complaint under the Wisconsin Employment Peace Act is governed by Sec. 111.07(14), which provides for a one-year period from the date of the specific act or unfair labor practice alleged. The complaint may be set for hearing.

Dated at Elkhorn, Wisconsin, this 21st day of May, 2002.

Karen J. Mawhinney /s/
Karen J. Mawhinney, Examiner

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