STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

SANDRA LEE BENEDICT, Complainant,

vs.

EAU CLAIRE ASSOCIATION OF EDUCATORS, Respondent.

Case 1
No. 57345
Cw-3669

Decision No. 29689-B

SANDRA LEE BENEDICT, Complainant,

vs.

WISCONSIN EDUCATION ASSOCIATION COUNCIL (WEAC), Respondent.

Case 18
No. 57284
Cw-3668

Decision No. 29690-B

SANDRA LEE BENEDICT, Complainant,

vs.

EAU CLAIRE AREA SCHOOL DISTRICT, Respondent.

Case 54
No. 57283
MP-3488

Decision No. 29691-B

No. 29689-B
No. 29690-B
No. 29691-B

Appearances:

Ms. Sandra Lee Benedict, 3642 Livingston Lane, Eau Claire, Wisconsin 54701, appearing on his own behalf.

Mr. John D. Finerty, Jr., Kravit, Gass, Hovel & Leitner, Attorneys at Law, 825 North Jefferson Street, Milwaukee, Wisconsin 53202-3737, appearing on behalf of Wisconsin Education Association Council (WEAC), and Eau Claire Area Association of Educators (ECAE).

Mr. James M. Ward, Weld, Riley, Prenn & Ricci, S.C., Attorneys at Law, 4330 Golf Terrace, Suite 205, P.O. Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Eau Claire Area School District (District).

ORDER TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED

On February 5, 1999, Complainant filed a complaint of prohibited practice alleging that the District had violated, among other statutes, the "False Claims Act," the "Wisconsin Fair Employment Law," the "Municipal Employment Relations Act," the "Fair Labor Standards Act," the "ADEA (Age Discrimination Act)," the "OWBPA (Older Workers Benefit Protection Act)," the ERISA (Employee Retirement Income Security Act)," the "Truth in Negotiations Act," and the "Federal Acquisition Regulation (FAR)." On February 5, 1999, Complainant filed a complaint of prohibited practice, including these allegations, against WEAC. On March 1, 1999, Complainant filed a complaint of prohibited practice, including these allegations, against the ECAE. In a letter to Complainant dated March 11, 1999, Peter G. Davis, the Commission's General Counsel, stated:

> On March 1, 1999, we received a complaint from you against the Eau Claire Association of Educators. The complaint consisted of: the one page WERC Complaint form; a 200 page petition for review in an EEOC/ERD case you have filed against the Eau Claire School District, WEAC and the Eau Claire Association of Educators; a 75 page brief in the EEOC/ERD case; four liability insurance policies; and a 75-page Petition for Mandamus.
>
> Because you did not provide us with any copies of your complaint and the lengthy attachments (as required by ERC 12.02-copy enclosed), we have not been able to serve a copy on the Eau Claire Association of Educators. . . .

> The best way to proceed would be for you to send me at least one additional copy of the complaint and attachments which I will then serve on the Educators.
>
> . . .

The complaints were subject to an informal conciliation effort, which ultimately proved unsuccessful.

After informal procedural contacts with the parties, I stated, in letters dated March 25, 1999, the status of Case 18 and Case 54 thus:

> . . . (Complainant) advised me that the complaint is, in her estimation, ready to be heard and that hearing it may require several days.
>
> If you disagree that the complaint is ready for hearing, I ask that you put your objection into motion form and file it with me. If you agree that the matter is ready to be heard, please advise me of dates you are available to hear it. . . .

Prior to its receipt of this letter, the District filed a motion asking that the Complainant make the complaint, in Case 54, more definite and certain, and filed correspondence indicating that it anticipated filing a motion to dismiss the complaint as untimely. In a letter dated March 30, 1999, the District responded to my March 25 letter. In its response, the District stated "issue has not even been joined at this juncture." The District also repeated its request that the complaint be made more definite and certain, and repeated its intent to file motions to dismiss the complaint if and when the complaint could be sufficiently specified to permit a response. WEAC responded to my March 25 letter in a letter dated April 6, 1999. In it, WEAC noted that it joined in the District's request that the complaints underlying Cases 18 and 54 be made more definite and certain, and noted that it intended to file motions to dismiss. WEAC also suggested the creation of a briefing schedule to permit the motion to make the complaint more definite and certain to be addressed. I responded in a letter, concerning Cases 18 and 54, dated April 13, 1999, which states:

> I write to state the status of the above noted matters. In response to my letter of March 25, 1999, the District and the Union have requested that the complaint be made more definite and certain. This request has merit, and I write to clarify what must be done before the complaint can be set for hearing.

Evidentiary hearing, under Sec. 111.07(2), Stats., (which is applicable to this dispute under Sec. 111.70(4)(a), Stats.), and under Sec. 227.01(3), Stats., contemplates the taking of evidence, through testimony or documents, which is relevant to disputed issues of fact. Prior to hearing it is necessary to establish, through a complaint and an answer, what, if any, facts can be considered in dispute. Sec. 12.02(2), of the Wisconsin Administrative Code establishes what the Commission deems necessary in a complaint to establish the facts necessary to a Complainant's case. At this point, the complaint filed in this matter does not meet the requirements of that section, and particularly Sec. 12.02(c). (sic) Until those requirements have been met, I can compel neither a meaningful answer nor a meaningful hearing.

Thus, I write to direct Ms. Benedict to file an amended complaint, which offers a "clear and concise statement of the facts constituting the alleged prohibited practice or practices." This should include "the time and place of occurrence of particular acts," and should also include "the sections of the statute alleged to have been violated." I would point out that the prohibited practices this agency can enforce against an employer under the Municipal Employment Relations Act appear at Sec. 111.70(3)(a), Stats. The prohibited practices this agency can enforce against a labor organization under the Municipal Employment Relations Act appear at Sec. 111.70(3)(b), Stats. Sec. 111.70(3)(c), Stats., provides the final source of prohibited practices this agency can enforce under the Municipal Employment Relations Act. As an Examiner, I can act only to the extent authorized under Chapter 111 of the Wisconsin Statutes. Thus, citation of law outside of Chapter 111 of the Wisconsin Statutes cannot, standing alone, support my exercise of this agency's jurisdiction.

I will not, at this time, specify a date by which this amendment must be filed. Because Ms. Benedict is the party requesting hearing, there is no reason to assume undue delay will result. Beyond this, the amendment may require research, and I do not want to limit Ms. Benedict's ability to perform that research. I stress that the complaints underlying each of the above-noted files already include allegations of fact. The purpose of this letter is to seek a complaint which alleges specific facts tied to the specific provisions of the Municipal Employment Relations Act. Some of the allegations of the complaints may be repeated to create the amended complaint. Those allegations should, however, be tied to statutory provisions this agency can enforce. . . .

In a letter to the parties in Case 18 and Case 54 dated April 20, 1999, I stated:

> I write as a follow-up to my letter of April 13, 1999. If it would be of assistance in the amendment of the complaint, I could supply examples of complaints filed with the agency in the past. Beyond this, I would be willing to conduct a pre-hearing conference, in person or by phone if it would assist us in bringing some clarity to the pleading process.
>
> Please let me know if you have an opinion on how to most efficiently bring clarity to the pleading process.

In a letter dated April 21, 1999, WEAC noted its opposition to "conducting meetings, conferences or other pretrial proceedings aimed at assisting Ms. Benedict or settling this case." On April 22, 1999, the Commission informally assigned me as examiner in Case 1.

On April 22, 1999, Complainant filed the complaint and attachments requested by Davis, concerning Case 1, in his March 11, 1999, letter.

In a letter to the parties, in all three cases, dated April 30, 1999, I stated:

> I write as a follow-up to my letters of April 13 and 20. Since issuing those letters I have received an additional file, which is noted above. Ms. Benedict should inform me if the three files noted above involve, in her opinion, three different sets of facts which result in prohibited practices by the named respondents or if the three files involve a common set of facts which results in prohibited practices by the named respondents.
>
> The answer to this question has a direct bearing on the amendment of the complaint. If the three files are best considered a single action against three respondents, then the files can be consolidated, only one complaint needs to be amended, and only one hearing or pre-hearing conference need be scheduled to address each file. If the files are distinguishable, then each complaint must be amended. Each party who receives this letter should feel free to comment as necessary.
>
> I enclose, as intimated in my earlier letters, documentation which I hope can assist in bringing some clarity to the pleadings. Specifically, I enclose the

> instruction sheet supplied by the Commission with its complaint forms, and a completed complaint form. I drafted the complaint form drawing from a file recently closed by the Commission. The purpose of the form is to illustrate a complaint involving more than one respondent and more than one prohibited practice allegation. The facts alleged are not lengthy, but are sufficient, in my opinion, to put the parties to such a dispute on notice of what the dispute is. It is my hope this can afford Ms. Benedict some guidance as she considers the amendment of her complaints.
>
> I will not set a pre-hearing conference or a hearing in this matter until the complaint has been drafted to allege violations of statutes enforceable by this agency.

In a letter to Complainant dated May 4, 1999, I enclosed "a copy of the statutes administered by the Commission."

Complainant responded to my letter of April 30 with a series of documents filed with the Commission on June 29, 1999. I summarized the contents of the material filed by the Complainant and the status of the litigation in a letter to the parties in all three cases dated July 9, 1999. That letter states:

> I write to state the status of the above-noted matters. Ms. Benedict has filed with the Commission a series of documents in response to my letter of April 30, 1999.
>
> The papers, filed with the Commission on June 29, 1999, include the following:
>
> (1) A three-page cover letter dated June 10, 1999.
>
> (2) A document, dated May 13, 1999, consisting of 114 numbered paragraphs with six pages of attachments.
>
> (3) A document, dated June 10, 1999, consisting of 37 numbered paragraphs, which seeks "judgment against Defendant Eau Claire Public School District."

> (4) A document, dated June 10, 1999, consisting of 22 numbered paragraphs, which seeks "judgment against the WEAC Labor Union". The document includes three pages of attachments.
>
> (5) A document, which is untitled, consisting of 25 pages with six pages of attachments.
>
> . . . Beyond this, I would like to know from Mr. Finerty and Mr. Ward whether they feel the documents noted above state the complaint with sufficient certainty to permit responsive pleadings or motions.

The District responded in a letter dated July 15, 1999, which states:

> . . .
>
> Since it is becoming increasingly apparent that an amended complaint in compliance with Section ERC 12.02(c), Wis. Admin. Code may be beyond Ms. Benedict's capabilities, we respectfully submit that, at the very least, she should be compelled to respond to our pending dismissal motion by promptly coming forward with clear and concise factual allegations allowing her to tenably maintain the position that one or more prohibited practices were committed by the District during the one-year limitation period applicable in this instance. Especially in light of the fact that nothing Ms. Benedict has filed to date has bridged the statute of limitations gap, perhaps some form of Order to Show Cause why this proceeding against the District should not be dismissed on that basis would be the best vehicle for doing so. . . .
>
> (W)e are confident that you will see fit to grant our pending dismissal motion on statute of limitations grounds. If, on the other hand, that motion is not granted for some unforeseen reason, then the District would reserve the right to file additional dismissal motions on grounds of *res judicata*, lack of subject matter jurisdiction, deferral to the Equal Rights Division, etc. . . .

WEAC and ECAE responded in a letter dated July 20, 1999, which states:

. . .

> Ms. Benedict has been given multiple opportunities to set forth a coherent claim, but she continues to file piles of paper hoping the commission or the parties will sort through everything and decipher her claims for here. We ask that her case, in its entirety, be dismissed for failure to state a claim within the jurisdiction of the commission and within the applicable statute of limitations.
>
> At the very least, Ms. Benedict should be forced to identify the conduct engaged in by the respondents, or any of them, that gives rise to a violation of the statutes and set forth a coherent theory of her case. Unless Benedict complies with this basic due process requirement, her claims ought to be dismissed. . . .

In a letter to the parties in all three cases dated August 2, 1999, I stated:

> In my opinion, the files noted above should be consolidated. This is consistent with Ms. Benedict's letter of June 29, 1999, and would make addressing the pending matters more efficient.
>
> Consolidation, as I read Commission case law, is beyond an Examiner's authority. I write to advise you that I am requesting the Commission to consolidate these three complaints.
>
> If you have any objection to the consolidation, please contact our General Counsel, Peter Davis. In the absence of any objection, I assume the Commission will consolidate the above-noted matters.

The Commission issued an order consolidating the three cases "for hearing and decision" on August 17, 1999.

In a letter dated August 19, 1999, the District noted that it "did not object to the proposed consolidation of these prohibited practice proceedings because it appears to have no impact on our Motion to Dismiss on grounds of untimeliness under the applicable one-year statute of limitations." In a letter to the parties dated August 24, 1999, I stated that the Commission's August 17 order, "in my opinion, takes no position on when, or if at all, hearing will occur." I also noted that Complainant had, by phone "asked me for a time line for a 'consolidated brief' which would also address Mr. Ward's letter of August 19, 1999." I addressed her concern thus:

> I informed her that she is currently under no deadline to file anything. Rather, the "ball is in my court" to detail what, if any, portions of the complaint can be set for hearing. To the extent the complaint cannot be set for hearing, I need to specify why not.
>
> I write this letter to advise each of you that I intend to examine the pleadings and state in writing to you what is necessary to pose these pleadings for hearing and/or dismissal. . . .

In letters dated August 22 and August 25, 1999, Complainant requested to amend the complaint and to submit a "consolidated brief" regarding the consolidated cases. Attached to those letters was a "consolidated complaint" dated August 23, 1999, and a "consolidated brief." In the August 22 and August 25 letters, Complainant noted, among other points, that:

> (S)eparate hearings will not be needed in order to obtain the necessary separate remedies at issue in the case. If this opinion is incorrect, please notify and specify.

Complainant included with her consolidated complaint voluminous accompanying material.

ORDER TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED

Complainant shall make her complaint in the cases noted above more definite and certain by filing with the Commission, on or before November 12, 1999, an amended complaint which complies with ERC 12.02(2)(c) by specifying:

1. A clear and concise statement of the facts constituting the alleged prohibited practice or practices, including the time and place of occurrence of particular acts and the sections of the statute alleged to have been violated.

    a. If Complainant uses the Commission complaint form, the entry at Section C shall state appropriate reference to specific subsections of Sec. 111.70(3)(a), (b) or (c), Stats. Reference to statutes outside of Subchapter IV of Chapter 111, Stats., need not be included.

b. Factual allegations included in the complaint shall state specific acts by the Respondents which fall within the one year period preceding February 5, 1999, in Cases 18 and 54, or preceding March 1, 1999, in Case 1.

c. Factual allegations should not include citation to legal authority or argument. After Commission receipt of the amended complaint, all parties will be permitted the opportunity to enter argument.

Dated at Madison, Wisconsin, this 7th day of October, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

EAU CLAIRE ASSOCIATION OF EDUCATORS
WISCONSIN EDUCATION ASSOCIATION COUNCIL (WEAC)
EAU CLAIRE AREA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER TO SHOW CAUSE WHY COMPLAINT SHOULD NOT BE DISMISSED

BACKGROUND

The procedural background to the varying motions, which is set forth above, highlights the uncertainty surrounding the consolidated complaints. The ultimate difficulty lies, however, with the complaints underlying each of the three cases. In my opinion, the complaints have yet to be stated in a fashion that permits a meaningful answer. I hoped, through the August 24, 1999, letter, to assume the responsibility for clarifying what, if any, issues could be considered posed for hearing. Complainant responded by filing a "consolidated complaint." That filing is voluminous, but adds, in my opinion, nothing of substance to the documents filed by Complainant on June 29, 1999. The June 29 documents are the basis for this Memorandum.

The June 29, 1999 Documents

I inventoried the June 29 documents in my letter of July 9, and this overview of those documents follows that summary. The three page cover letter gives Complainant's overview of the litigation and her "request for an Evidentiary Hearing." She notes her belief "that the three files are best considered in a consolidated single action against all respondents." She also notes that the complaints "are distinguishable and have been addressed in separate previous complaints to Equal Rights Division (ERD) as well as Equal Employment Opportunity Commission (EEOC)." She adds that "her previous statements of facts in all previous Briefs to ERD as well as to Federal District Court of Wisconsin and Chicago Court of Appeals were extremely sufficient . . . to put the parties on notice of the alleged prohibited practices disputed."

The document stating 114 numbered paragraphs covers a large amount of time and law. The document alleges that WEAC and ECEA violated Complainant's rights under Wisconsin's Fair Employment Act, based on her age and a disability. Beyond this, the document alleges ECEA and WEAC violated its duty to fairly represent Complainant regarding matters arising under and outside of a labor agreement between ECEA and the District. The document adds that they also failed to fairly represent Complainant by failing to negotiate appropriate anti-discrimination language. The document also ranges broadly in time. It alleges that on

September 25, 1986, Complainant was injured in a car accident, which disabled her. Due "to her continuing physical and emotional injuries resulting for the accident," she took medical leave from teaching, running from the Fall of 1990 through the Winter of 1991. Her injuries required accommodation from the District. In spite of this, the District denied her requests for specific assignments in the 1993-94, 1994-95 and 1995-96 school years. Beyond this, the ECEA failed to negotiate contract language to protect her, and then failed to enforce, on her behalf, involuntary transfer language it negotiated for the 1993-94 labor agreement. The District further compounded the ongoing discrimination by hiring a younger teacher, in the 1994-95 school year, to fill a vacancy Complainant could have filled. This prompted litigation before the EEOC in May of 1994, and before federal court in August of 1995. The discrimination culminated in her "constructive discharge." ECEA and WEAC have consistently declined to challenge the constructive discharge.

The document consisting of 37 numbered paragraphs also covers a considerable expanse of law and time. It alleges District violation of a number of federal laws, Wisconsin's Fair Employment and Unemployment Compensation Acts, and the collective bargaining agreement. The bulk of the factual allegations are undated, but the document does state that she "was constructively discharged as of March 21, 1997."

The document consisting of 22 numbered paragraphs alleges that her discharge violates the labor agreement, and that WEAC and ECEA have failed to represent her interests at the time of, and subsequent to, the discharge. ECEA, for example, failed to represent her at an April 16, 1998 hearing before the Equal Rights Division. As a result, the document states that "the Court" should determine the merit of her discharge under the just cause provision of the 1996-97 labor agreement." The document also calls Complainant's entitlement to Worker's Compensation into question.

The twenty-five page document contains legal argument ranging from "common-law duties" through "tort concepts" to the "U.S. Constitution." This does not exhaust the breadth of the violations asserted in the brief, but highlights the expanse of her arguments. The document does not contain specific factual allegations except as deemed necessary by Complainant to highlight her legal arguments.

DISCUSSION

Complaint is correct that the three complaints are contested cases. Sec. 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. Complainant's interest in her loss of employment is "substantial." It is apparent that the District, WEAC and ECAE dispute Complainant's interest. Hearing of alleged prohibited practices is mandated by Sec. 111.07(2)(a), Stats., and Sec. 111.70(4)(a), Stats. Thus, this is a contested case.

It does not, however, follow from this that Complainant can claim the consolidated complaints require evidentiary hearing. Her remedial requests are based on proven violation of some or all of Secs. 111.70(3)(a), (b), or (c), Stats. Fact, however, is necessary to invoke these statutes. Where fact is disputed, evidence must be taken to determine what disputed fact can be considered proven. This is the purpose of evidentiary hearing. The necessary prerequisite is a clear statement of fact, which if proven, can invoke statute.

This is the background to ERC 12.02(2)(c), which requires "(a) clear and concise statement of facts constituting the alleged prohibited practice . . . including the time and place of occurrence of particular acts." The reference to "the time . . . of occurrence" reflects the role of Sec. 111.07(14), Stats., which restricts the "right of any person to proceed" to "one year from the date of the specific act . . . alleged." To this point in this litigation, Complainant has not set forth a document meeting these requirements. The essential prelude to an evidentiary hearing has not, therefore, been met. Further complicating the pleading process is the fact that the allegations must state rights enforceable through the Municipal Employment Relations Act. MORAINE PARK TECHNICAL COLLEGE ET AL., DEC. NO. 25747-B (MCLAUGHLIN, 3/89), AFF'D, DEC. NO. 25747-D (WERC, 1/90). The Commission "only has those powers which are expressly or impliedly conferred on it by statute." BROWNE V. MILWAUKEE BD. OF SCHOOL DIRECTORS, 83 WIS.2D 316, 333 (1978).

To this point, Complainant has cited statutes over which the Commission has no apparent jurisdiction, has offered more volume than detail in specifying the facts constituting the alleged statutory violations and has been less than detailed in specifying the time and place of occurrence of particular acts. More significantly, what detail there is regarding dates

affords no basis to conclude any of the complained of conduct falls within the one year period preceding the filing of the complaints in Cases 18 and 54 on February 5, 1999. She filed the complaint in Case 1 at a later date, which only compounds the arguable untimeliness.

Against this background, I have issued the Order to Show Cause specified above. The District has suggested this as an option, and the option is well founded in Commission case law, see STATE OF WISCONSIN ET. AL., DEC. NO. 16487-D (YAEGER, 11/78) and MILWAUKEE BOARD OF SCHOOL DIRECTORS ET. AL., DEC. NO. 18408-E (WERC, 5/86). The purpose of the Order is to secure from Complainant, if possible, a complaint upon which further proceedings can be based.

The specifics of the Order need not be discussed at length. The Order does not seek argument from any of the parties until Complainant has filed an amended complaint to comply with the Order. After that document is received, the parties will be afforded the opportunity to enter argument as to whether hearing should be ordered or whether the complaint should be dismissed. The Order grants Complainant at least thirty calendar days to file the amendment. This is an outside limit. If she wishes to advance the case, she may file as soon as she wishes. It should be stressed that the Order does not seek the submission of exhibits or arguments. Rather, the Order seeks only a simple, concise statement of the facts, including the time and place of their occurrence, constituting the alleged prohibited practices.

The Order stresses that the allegations must state acts falling within the one year period preceding the filing of the complaints. These acts must, "in and of themselves" constitute prohibited practices. See, LOCAL LODGE NO. 1424 V. NLRB (BRYAN MFG. CO.), 362 U.S. 411 (1960), 45 LRRM 3212, AT 3214-3215, adopted in CESA NO. 4 ET. AL., DEC. NO. 13100-G (WERC, 5/79); for an application of BRYAN, see MORAINE PARK TECHNICAL COLLEGE, DEC. NO. 25747-C (MCLAUGHLIN, 9/89), AFF'D, DEC. NO. 25747-D (WERC, 1/90).

Dated at Madison, Wisconsin, this 7th day of October, 1999.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner
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