STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GEORGE MUDROVICH, Complainant,

vs.

D.C. EVEREST AREA SCHOOL DISTRICT, Respondent.

Case 53
No. 57582
MP-3522

Decision No. 29946-A

Appearances:

Mr. George A. Mudrovich, 826½ Steuben Street, Wausau, Wisconsin 54403, appearing on his own behalf.

Ruder, Ware & Michler, S.C., by **Attorney Ronald J. Rutlin**, 500 Third Street, P.O. Box 8050, Wausau, Wisconsin 54402-8050, appearing on behalf of the Respondent.

ORDER DENYING MOTION TO ADOPT ARBITRATOR'S FINDING OF FACT THAT RESPONDENT WAS MOTIVATED IN PART BY COMPLAINANT'S PROTECTED UNION ACTIVITY WHEN RESPONDENT LAID COMPLAINANT OFF ON JUNE 23, 1998

On May 26, 1999, Complainant filed a prohibited practice complaint with the Wisconsin Employment Relations Commission alleging that the Respondent had violated Sec. 111.70(3)(a)1 and 3, Stats., by the administration recommending Complainant's layoff and the school board members approving the same and rejecting Complainant's application for full-time employment, in part, due to Complainant's protected, concerted activity. On August 1, 2000, Coleen A. Burns was appointed by the Commission to act as Examiner in this case. On July 26, 2000, Complainant filed a Motion to Adopt Arbitrator's Finding of Fact that

Respondent was Motivated in Part by Complainant's Protected Union Activity when Respondent Laid Complainant off on June 23, 1998. On August 16, 2000, Respondent filed a response to Complainant's Motion to Adopt Arbitrator's Finding of Fact that Respondent was Motivated in part by Complainant's Protected Union Activity when Respondent Laid Complainant off on June 23, 1998. Having considered the argument of the parties and the record as a whole, the Examiner makes and issues the following

ORDER

Complainant's Motion to Adopt Arbitrator's Finding of Fact that Respondent was Motivated in part by Complainant's Protected Union Activity when Respondent Laid Complainant off on June 23, 1998, is denied.

Dated at Madison, Wisconsin, this 24th day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

D.C. EVEREST SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO ADOPT ARBITRATOR'S FINDING OF FACT THAT RESPONDENT WAS MOTIVATED IN PART BY COMPLAINANT'S PROTECTED UNION ACTIVITY WHEN RESPONDENT LAID COMPLAINANT OFF ON JUNE 23, 1998

On July 26, 2000, Complainant filed a Motion to Adopt Arbitrator's Finding of Fact that Respondent was Motivated in part by Complainant's Protected Union Activity when Respondent Laid Complainant off on June 23, 1998. The "Finding of Fact" that Complainant asks the Examiner to adopt is contained in the award of Arbitrator McAlpin dated January 18, 2000.

On August 16, 2000, Respondent filed a Response to Complainant's Motion. As Respondent argues, to prevail upon the allegation that Respondent violated Sec. 111.70(3)(a)3, Stats., Complainant must prove, by a clear and satisfactory preponderance of the evidence, the following elements:

(1) Complainant has engaged in protected, concerted activity;

(2) Respondent was aware of such activity;

(3) Respondent was hostile to such activity; and

(4) Respondent's complained of conduct was motivated at least in part by such hostility.

As Respondent further argues, the effect of granting Complainant's Motion would be to bar Respondent from litigating the issue of Respondent's alleged unlawful motive for the layoff of Complainant. Thus, Complainant is invoking the doctrine of issue preclusion.

As Examiner Nielsen stated in MILWAUKEE COUNTY, DEC. NO. 28951-B (7/98):

> Issue preclusion is the term now applied to what was formerly referred to as collateral estoppel. It is "a flexible doctrine that is bottomed in concerns of fundamental fairness and requires that one must have had a fair opportunity procedurally, substantively and evidentially to litigate the issue before a second litigation will be precluded." DANE COUNTY, SUPRA. Although issue preclusion does not require an identity of parties, it does require actual litigation of an issue necessary to the outcome of the first action.

> Both claim preclusion and issue preclusion are recognized and accepted doctrines before the Commission. See, for example, WISCONSIN TELEPHONE COMPANY, DEC. NO. 4471 (WERB, 5/57); MARK BENZING V. WEAC, DEC. NO. 28543-A (MCGILLIGAN, 9/16/97).

A grievance relating to Complainant's layoff was litigated before Arbitrator McAlpin. As set forth in the transcript of the proceeding before Arbitrator McAlpin, the parties to that proceeding stipulated to the following issue:

> Did the District violate Articles 10, 32(B)(5), 32(E) and/or 32(I) when it laid off the grievant from his 80% position, and failed to appoint him to 100% position for the '98-99 school year?
>
> If so, what is the remedy?

The allegation that Respondent has violated Sec. 111.70(3)(a)3, Stats., was not presented to Arbitrator McAlpin. This is the first time that Complainant and Respondent have appeared in a forum having jurisdiction to hear, decide and remedy the statutory claim that Respondent has violated Sec. 111.70(3)(a)3, Stats.

Respondent has not had a fair opportunity procedurally, substantively and evidentially to litigate the issue of Respondent's alleged unlawful motive for the layoff of the Complainant. Accordingly, Respondent is not precluded from litigating this issue before the Examiner.

Complainant's Motion to Adopt Arbitrator's Finding of Fact that Respondent was Motivated in part by Complainant's Protected Union Activity when Respondent Laid Complainant off on June 23, 1998 is denied.

Dated at Madison, Wisconsin, this 24th day of August, 2000.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

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