

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JENNIFER A. PESHUT, Complainant,

vs.

**UNIVERSITY OF WISCONSIN – MILWAUKEE; NANCY L. ZIMPHLER;
SHANNON BRADBURY;**

and

**COUNCIL 24, AMERICAN FEDERATION OF STATE, COUNTY AND
MUNICIPAL EMPLOYEES, AFL-CIO; WISCONSIN STATE EMPLOYEES UNION;
MARTIN BEIL; and JANA WEAVER**, Respondents.

Case 516
No. 59886
PP(S)-320

Decision No. 30125-B

Appearances:

Mr. Geoffrey R. Skoll, P.O. Box 11116, Milwaukee, WI 53211, appearing on behalf of the Complainant, Jennifer Peshut.

Lawton & Cates, S.C., by **Attorney P. Scott Hassett**, 214 West Mifflin Street, P.O. Box 2965, Madison, WI 53703-2594, appearing on behalf of the Respondent WSEU.

Mr. David Vergeront, Legal Counsel, Department of Employment Relations, P.O. Box 7855, Madison, WI 53707-7855, appearing on behalf of the Respondent, University of Wisconsin-Milwaukee.

**FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER DISMISSING COMPLAINT**

Daniel Nielsen, Examiner: The above-named Complainant having filed with the Commission a complaint, alleging that the above-named Respondents have violated the provisions of Ch. 111, Wis. Stats, by interfering with her right to engage in protected concerted activity, to

Dec. No. 30125-B

wit, acting in her capacity as a Steward to represent other employees in meetings with management and in the grievance procedure; and the Respondent WSEU having submitted a Motion to Dismiss for Failure to State a Claim and Lack of Standing, with a supporting brief; and the Respondent University of Wisconsin-Milwaukee having filed a statement in support of the Motion to Dismiss; and the Complainant having submitted a statement and argument in opposition to the Motion; and the Examiner being fully advised in the premises, makes and issues the following Findings of Fact, Conclusions of Law and Order.

To maximize the ability of the parties we serve to utilize the Internet and computer software to research decisions and arbitration awards issued by the Commission and its staff, footnote text is found in the body of this decision.

FINDINGS OF FACT

1. On April 23, 2001, Jennifer A. Peshut filed a complaint of prohibited practices against the University of Wisconsin-Milwaukee, Chancellor Nancy Zimpher, Labor Relations Coordinator Shannon Bradbury, AFSCME Council 24, the Wisconsin State Employees Union, Executive Director Martin Beil and Field Representative Jana Weaver, alleging as follows:

I. Parties to the Complaint

1. The complainant, Jennifer A. Peshut is an individual residing in Milwaukee, Wisconsin and her mailing address is Post Office Box 11116, Milwaukee WI 53211, telephone 414.562.2028.

2. The respondent, the University of Wisconsin-Milwaukee (UWM), is a part of the University of Wisconsin System governed by the Board of Regents of the University of Wisconsin System. The University of Wisconsin--Milwaukee is an institution doing business in Milwaukee, Wisconsin with offices at 2310 E. Hartford Avenue, Milwaukee, Wisconsin 53211 and its mailing address is Post Office Box 413, Milwaukee WI 53201. Its chief executive officer is Nancy L. Zimpher, Chancellor, telephone 414.229.4331.

3. The respondent, Shannon Bradbury is Labor Relations Coordinator, UWM, Post Office Box 413, Milwaukee, Wisconsin 53201, telephone 414.229.6480.

4. The respondent, American Federation of State, County, and Municipal Employees (AFSCME) Council 24, is a part of the Wisconsin State Employees Union. AFSCME Council 24 is a union doing business in Madison, Wisconsin with offices at 8033 Excelsior Drive, Suite C, Madison, WI 53717. The Executive Director is Martin Beil, whose telephone number is 608.836.0024.

5. The respondent, Jana Weaver is a Field Representative of AFSCME Council 24, WSEU, 8033 Excelsior Drive, Suite C, Madison, WI 53717 telephone 608.836.0024.

II. Statement of the Complaint

1. The complainant, Ms. Peshut, has been at all times material to this complaint a Program Assistant at UWM, and she is covered by the *Agreement Between the State of Wisconsin and AFSCME Council 24* (the contract).

2. The employer UWM through Bradbury violated ss. 111.84(1)(a) and 111.84(1)(e) by interfering with Ms. Peshut's right to engage in lawful, concerted activities by delaying hearing and refusing to hear and answer a duly filed Step 2 grievance on behalf of another employee, Mary Pichelmann who is also covered by the contract.

3. The employer violated ss. 111.8(1)(a), 111.84(1)(c), and 111.84(1)(e) by engaging in a pattern and practice over a four-and-one-half year period of delay in hearing and answering grievances, which violates the contract, interferes with employees' concerted activities, and has the effect of discouraging membership in a labor organization.

4. The respondent Council 24 through Weaver violated s. 111.84(2)(a)(b) and 111.84(3) Wis. Stats. by coercing and intimidating Ms. Peshut, and interfering with her concerted activities with other employees: namely, representing Ms. Pichelmann in her attempt to present a Step 2 grievance to Bradbury April 5, 2001. Weaver also interfered with Ms. Peshut's concerted activities by inducing the president of AFSCME Local 82, Stan Yasaitis, to interfere with Ms. Peshut's legal rights, including but limited to representing Ms. Pichelmann in presenting her grievance to UWM.

III. Relief Sought

As remedy for the unfair labor practices stated above, the complainant, Jennifer A. Peshut, asks the Wisconsin Employment Relations Commission to declare and order as follows.

1. The respondents, UWM, *et al.* and Council 24, *et al.* committed unfair labor practices as alleged above.

2. The respondents must cease and desist from such violations in the future.

3. A hearing of this WERC complaint be held no more than forty days after it is filed.

4. This WERC complaint be consolidated with that of Ms. Pichelmann dated April 16, 2001 and received by WERC April 18, 2001.

IV. The required \$40.00 filing fee accompanies this complaint.

I swear the allegations above are true.

/s/ Jennifer A. Peshut

2. On May 2nd, the Examiner wrote to the Complainant, and to Mary Pichelmann, the Complainant in a companion case, directing them to make clarifications in their complaints. With respect to Peshut's complaint the Examiner asked:

Peshut Complaint:

1. Page 2 — Item 2: What is the source of Ms. Peshut's asserted right to present grievances on behalf of employees — i.e. Is she a steward, or does she hold some other position in the local union?
2. Page 3 — Item 4: What specifically is the conduct allegedly engaged in by Weaver that coerced or intimidated Ms. Peshut? When and where did this conduct take place?

3. On May 4th, Peshut's representative, Geoffrey Skoll, replied to the Examiner's directive:

II. Ms. Peshut's Complaint, Case 516.

1. Page 2 — Item 2: What is the source of Ms. Peshut's asserted right to present grievances on behalf of employees — i.e. Is she a steward, or does she hold some other position in the local union?

At all times material to the complaint, Ms. Peshut was a steward in AFSCME Local 82.

2. Page 3 — Item 4: What specifically is the conduct allegedly engaged in by Weaver that coerced or intimidated Ms. Peshut? When and where did this conduct take place?

April 5, 2001, Engelmann Hall, University of Wisconsin-Milwaukee, Jana Weaver told Ms. Peshut that she would stop Ms. Peshut from presenting

Ms. Pichelmann's grievance to the employer without first meeting with Weaver. Weaver also said Ms. Pichelmann had to meet with Weaver without Ms. Peshut in order to present her grievance to the employer. Ms. Peshut was Ms. Pichelmann's chosen grievance representative.

4. On May 4th, Respondent Wisconsin State Employees' Union forwarded to the Examiner a Motion to Dismiss and accompanying brief, arguing that Peshut's complaint lacked sufficient specificity, and that Peshut lacked standing as a party in interest to bring the complaint.

5. On May 7th, Ms. Peshut submitted a statement in opposition to the Motion.

6. Also on May 7th, the Examiner received a letter from the Employer Respondents, joining in the Motion to Dismiss. The letter recited a statement made by Peshut in support of her Petition for Review of another Examiner's decision to close the record in two separate complaint cases (Dec. Nos. 29775-C and 29776-C). Peshut's Petition referred to the allegations in the instant complaint, which she had sought to litigate in the other case. She stated that "The March 20, 2001 amendment differs from the original complaint only in Ms. Peshut's role as a grievance representative for another employee [Ms. Pichelmann] in contrast to her role as grievant in the original complaint."

7. Peshut's complaint of unfair labor practices is premised upon the Employer and WSEU's alleged interference with her right to function as a Union Steward for Local 82. Local 82 is not the exclusive bargaining representative for employees at UWM.

8. Peshut's complaint of unfair labor practices does not allege any action against her individually by either the Employer or the WSEU.

On the basis of the above and foregoing Findings of Fact, the Examiner makes and issues the following

CONCLUSION OF LAW

The Complainant, Jennifer Peshut, is not a party in interest within the meaning of Section 111.07(2), Stats., and ERC 22.02(1), Wis. Administrative Code, for the purpose of filing the instant complaint of unfair labor practices.

On the basis of the above and foregoing Conclusion of Law, the Examiner makes and issues the following

ORDER

That the instant complaint be, and the same hereby is, dismissed in its entirety. The companion case, Case 515, will proceed to hearing as previously scheduled.

Dated at Racine, Wisconsin, this 11th day of May, 2001

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner

DEPARTMENT OF EMPLOYMENT RELATIONS (UW-MILWAUKEE)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION
OF LAW AND ORDER DISMISSING COMPLAINT

A. The Pleadings and Arguments

The instant complaint is filed by Jennifer Peshut, an individual employed as a Program Assistant by the University of Wisconsin-Milwaukee, and a Steward for Local 82 of AFSCME. Her complaint alleges that agents of the University interfered with her protected rights by refusing to answer grievances submitted by her in her capacity as a Steward. She specifically cites a grievance filed on behalf of Mary Pichelmann, and alleges that the University's Labor Relations Coordinator was guilty of "delaying hearing and refusing to hear and answer a duly filed Step 2 grievance" concerning Pichelmann. She alleges that this is part of a four and one-half year practice of delaying hearings and answers in grievances.

The Complainant further alleges that agents of the WSEU interfered with her right to present grievances on behalf of Pichelmann. Specifically, she asserts that Union Field Representative Jana Weaver told Pichelmann on April 5, 2001 that she would stop her from presenting her grievance unless Pichelmann first agreed to meet with Weaver outside of the Complainant's presence, and that Weaver induced Local 82 President Stan Yasaitis to interfere with the Complainant's right to represent Pichelmann in the presentation of her grievance.

The WSEU's Motion to Dismiss asserts that the complaint is devoid of specific factual allegations, and fails to satisfy the requirements of ERC 22.02 which requires "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 thereby." However, prior to receipt of the WSEU's Motion, the Examiner, on his own motion, directed the Complainant to make her complaint more definite and certain, and the Complainant supplied additional facts, fleshing out the allegations of the complaint. The additional facts make the complaint sufficiently clear and specific to satisfy the requirement of the Administrative Rules. Accordingly, that portion of the Motion to Dismiss is denied. /1

1/ A companion case, PICHELMANN v. UWM, ET. AL., Case 515, raises many of the same factual issues as Peshut's complaint. There too, the Respondents moved to dismiss for lack of specificity prior to the clarification. That Motion has been denied because the clarification there makes the complaint sufficiently specific to satisfy the Rules. While the two cases were consolidated for hearing, in practical terms the decision to dismiss Peshut's complaint leaves only the Pichelmann case ripe for hearing at this time. That case will proceed to hearing as originally scheduled, and will not be held in abeyance pending any further proceedings on Peshut's complaint.

The WSEU's Motion also asserts that the Complainant lacks standing to bring the instant complaint. The Complainant brings this action citing her rights as a Steward for the Local 82, but WSEU argues that local affiliates are not parties in interest for the purpose of filing unfair labor practice charges, and that by extension, an official of the local, such as a steward, cannot be a party in interest. WSEU cites the Commission's decision in *MARK THOMAS V. UW HOSPITALS AND CLINICS*, DEC. NO. 28072-B (WERC, 8/20/97) (hereinafter referred to as *THOMAS*), and observes that the logic of that decision is that the individual employee, Pichelmann, would have standing, and WSEU would have standing, but that no other entity stands as a party in interest to this matter.

The University seconds WSEU's objections, and notes that the Complainant, in a recent pleading to the Commission in another case, conceded that her role in this matter was solely that of a grievance representative. Given that limited role, she has no standing.

The Complainant denies that she lacks standing. She notes that hers is a contested case under Ch. 227, the Administrative Procedures Act, and that she is thus guaranteed a full hearing before the disposition of her rights. There is a strong presumption against pre-hearing dismissal of complaints, and such an action can only be undertaken if the Respondents prove that her complaint cannot be upheld, under any set of facts. There is absolutely no factual basis for such a finding.

The Respondents misread the Commission's decision in *THOMAS*. The Commission specifically held in that case that individual employees are parties in interest for purpose of complaint filing, while affiliated locals of the WSEU were not. This complaint is brought by Peshut herself, in response to the Respondents' interference with her individual right to act on behalf of, and in concert with, other employees for the purposes of mutual aid and protection.

B. Discussion

Peshut asserts interference with her right to act on behalf of other employees in her capacity as a steward. The Examiner's directed the Complainant to submit a more definite and certain statement of the facts in this and the companion case. One of the questions posed was "What is the source of Ms. Peshut's asserted right to present grievances on behalf of employees – i.e. Is she a steward, does she hold some other position in the local union?" The answer submitted was "At all times material to the complaint, Ms. Peshut was a steward in AFSCME Local 82." This echoes her submission in Case Nos. 465 and 466, wherein she describes her involvement in the Pichelmann grievance as arising from "her role as a grievance representative for another employee."

Certainly a refusal to meet with a steward or interference with a steward's activities may give rise to a complaint of interference with protected rights. The issue before the Examiner on this Motion is whether that claim can be brought by the Steward in her own name against the wishes of the Union. For the reasons outlined below, I conclude that it cannot, and therefore have dismissed the complaint.

Section 111.07(2)(a), WEPA, requires that a complaint of unfair labor practices be brought by a "party in interest". 2/ A labor organization is a party in interest to a dispute if it enjoys status as the bargaining representative for the affected employees. 3/ An individual employee may also be a party in interest, depending upon the nature of the allegations. In THOMAS, a Steward, acting on behalf of a local union affiliated with WSEU, filed a complaint against the State alleging refusal to bargain and interference with protected rights. WSEU intervened in the case, and moved to dismiss, asserting that the local union lacked standing since WSEU was the sole and exclusive bargaining representative. The Examiner determined that the local union was not a party in interest to the case, because of WSEU's exclusive status. On appeal, the Commission affirmed that portion of the Examiner's Order.

2/ Sec. 111.07 controls the submission of unfair labor practice in State cases. See, Sec. 111.84(4), SELRA. This requirement is mirrored in the Wisconsin Administrative Code provisions concerning State unfair labor practice proceedings. See ERC 22.02(1).

3/ See SOUTHERN LAKES UNITED EDUCATORS, DEC. No. 21092 (NIELSEN, 10/83) at pages 9-10, and the cases cited in footnote 10 of that decision.

Peshut's complaint is brought in her own name, and purports to complain of interference with her individual right to represent Pichelmann and others. However, that right flows from her status as a Steward, an agent of the Union. It is derivative of the Union's rights under the negotiated grievance procedure and the duty to bargain. In a case such as this, it also derivative of Pichelmann's contractual and individual right to representation. Both the Union and Pichelmann would have standing to assert a complaint for interference with Peshut's efforts to process grievances and represent Pichelmann. 4/ Peshut, however, has no free standing commission to represent employees on her own motion. If Pichelmann, UWM and the Union agreed that she should play no role in the processing of this grievance, Peshut would not be able to assert that the decision was an unfair labor practice. That is because these are not Peshut's rights which are in issue here. 5/

4/ Indeed, Pichelmann has asserted that complaint in the companion case.

5/ There is no allegation that Peshut has suffered any adverse consequence or retaliation from either the Employer or the Union, aside from being frustrated in her desire to represent Pichelmann.

Complainant Peshut is correct that dismissal of a complaint without a hearing is not a preferred route. However, assuming every allegation of fact in the complaint to be true, her theory of the case still fails to state anything that constitutes an unfair labor practice with respect to her. As such there is no genuine issue of law to be decided by the Examiner.

ERC 22.06 specifically contemplates that unfair labor practice charges involving State entities may be disposed of “upon granting a motion for dismissal of a complaint.” Where, as here, there is no genuine issue of law and a finding in the Complainant’s favor on all facts would still lead to judgment in favor of the Respondents, such a motion is an appropriate vehicle for disposing of a fatally deficient complaint. /6

6/ See MORAINÉ PARK TECHNICAL COLLEGE, DEC. No. 25747-D (WERC, 1/90).

Dated at Racine, Wisconsin, this 11th day of May, 2001.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Daniel Nielsen /s/

Daniel Nielsen, Examiner