

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

FRANCIS C. TOPEL, Complainant,

vs.

**MILWAUKEE COUNTY DEPARTMENT OF PUBLIC WORKS,
HIGHWAY DIVISION and AFSCME, COUNCIL 48
AFL-CIO, LOCAL 882**, Respondents.

Case 514
No. 60566
MP-3777

Decision No. 30351-A

Appearances:

Alan C. Olson & Associates, S.C., Attorneys at Law, by **Ms. Faye D. Boom**, 2880 South Moorland Road, New Berlin, Wisconsin 53151-3744, on behalf of Complainant Francis C. Topel.

Mr. Timothy R. Schoewe, Deputy Corporation Counsel, Milwaukee County, 901 North Ninth Street, Room 303, Courthouse, Milwaukee, Wisconsin 53233, on behalf of Respondent Milwaukee County.

**ORDER DENYING IN PART AND
GRANTING IN PART MOTION TO DISMISS**

On November 19, 2001, Complainant filed his complaint with the Wisconsin Employment Relations Commission wherein he alleged that Respondent Milwaukee County had violated his rights under a series of collective bargaining agreements between Respondent Milwaukee County and Respondent District Council 48, AFSCME, AFL-CIO, and that Respondent District Council 48 had failed to fairly represent him with regard to grievances he had filed regarding those alleged violations.

On April 8, 2002, Complainant filed an amended complaint with the Commission.

No. 30351-A

Following a pre-hearing conference held on May 8, 2002 with the Examiner and counsel for Complainant and Respondents, Complainant filed a second amended complaint on May 22, 2002 clarifying the complaint in more detail.

The undersigned, David E. Shaw, of the Commission's staff, was appointed as Examiner in the matter to make and issue Findings of Fact, Conclusions of Law and Order. Hearing was scheduled for July 15 and 16, 2002, but was postponed due to the Examiner's illness.

At hearing on September 11, 2002, Complainant was directed to file a third amended complaint in order to further clarify his allegations and to correct certain technical defects in the pleadings, and Respondents were to then file their respective responses/answers to the amended complaint.

On October 1, 2002, Complainant filed the third amended complaint. On October 24, 2002, Respondent Milwaukee County filed its answer wherein it raised certain affirmative defenses. In addition, Respondent Milwaukee County filed a motion to dismiss the complaint on a number of bases. On November 1, 2002, Complainant filed a response in opposition to the motion to dismiss.

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.

Having considered the parties' pleadings and the applicable law, the undersigned makes and issues the following

CONCLUSIONS OF LAW

1. The Wisconsin Employment Relations Commission has jurisdiction to decide alleged violations of Sec. 111.70(3)(a)5 and Sec. 111.70(3)(b)1 of the Municipal Employment Relations Act.

2. The third amended complaint filed by Topel on October 1, 2002, clarifies the original complaint filed by Topel on November 19, 2001, and alleges facts which, if proved, are not barred by Sec. 111.07(14), Stats., and which provide a basis for finding violations and granting relief under Sec. 111.70(3)(b)1, Stats., and Sec. 111.70(3)(a)5, Stats., except as to paragraph 7, subparagraphs J and K of the third amended complaint.

Based upon the above Conclusions of Law, the undersigned makes and issues the following

ORDER

The motion to dismiss is denied except as to the allegations in paragraph 7, subparagraphs J and K of the third amended complaint.

Dated at Madison, Wisconsin, this 7th day of November, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

MILWAUKEE COUNTY

**MEMORANDUM ACCOMPANYING ORDER DENYING IN PART
AND GRANTING IN PART MOTION TO DISMISS**

Respondent Milwaukee County, hereinafter the County, has moved to dismiss the complaint in its entirety or in part on the following bases:

1. Any matter occurring prior to September 30, 2002 should be dismissed as being outside the statute of limitations contained in ss. 111.70, Wisconsin Statutes.
2. Matters referencing the collective bargaining agreement and its exclusive dispute resolution mechanism should be dismissed as barred by doctrines of preclusion.
3. The WERC lacks jurisdiction over the complaint.
4. The complainant is attempting to reform the labor agreement by his complaint. The WERC does not have jurisdiction in the forum of this complaint to set aside or amend extant collective bargaining agreements.
5. There is no nexus between conduct alleged against Milwaukee County and that of the respondent union.
6. Failure to state a cause of action upon which relief may be granted.
7. The complaint is frivolous.

Complainant argues in opposition to the motion first that at most Sec. 111.07(14), Stats., would bar only those matters occurring more than one year prior to the date the original complaint was filed (November 19, 2001), but that in this case there are extenuating circumstances which permit consideration of actions that took place prior to that time. Final action on the grievance Complainant filed regarding denial of a promotion in 1999 did not occur until 2001 and therefore the matter should not be considered time barred by Sec. 111.07(14), Stats. Further, the actions complained of in 1999 are continuing violations as the violations have continued to occur in the County's promotional process in 2001.

As to preclusion, the Wisconsin Supreme Court has held that in order for an earlier proceeding to bar a present suit, three factors must be present, including a final judgment on the merits by a court of competent jurisdiction. *NORTHERN STATES POWER COMPANY V.*

BUGHER, 189 WIS. 2D 541, 551 (1995). The Respondent Union has failed to process Complainant's grievances beyond Step 2 of the contractual grievance procedure. Therefore, there has been no hearing in a disinterested forum, much less a final judgment in a court of competent jurisdiction.

As to the allegation that the Commission lacks jurisdiction over the complaint, Complainant asserts he is alleging violations of Secs. 111.70(3)(a)5 and 7, Stats., and Sec. 111.70(3)(b)1, Stats. The Commission has jurisdiction under Ch. 111.70, Stats., to hear and decide such alleged prohibited practices.

As to the County's fourth alleged basis, Complainant asserts he is not seeking to reform the collective bargaining agreement, rather, he is seeking to enforce it.

As to the alleged lack of a nexus between the County's actions and the action of the Respondent Union, Complainant asserts that he is alleging that the County violated his contractual rights causing him harm, and that the Union failed in its duty to diligently represent him in pursuing the grievances he had filed regarding those violations.

As to the allegations that the complaint fails to state a cause of action and is frivolous, Complainant asserts that the Commission has held that,

Given 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 should be granted only if under no interpretation of the facts alleged would Complainant be entitled to relief.

EATON CORPORATION, DEC. NO. 26890-B (Burns, 6/91).

DISCUSSION

As Complainant asserts, the Commission has consistently held that,

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.

UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, DEC. NO. 15915-B (Hoorstra, with final authority for WERC, 12/77) at p. 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94); AUGUSTA SCHOOL DISTRICT, DEC. NO. 27857-A (Shaw, 2/94); and STATE OF WISCONSIN, DEC. NO. 27365-A (Schiavoni, 12/92).

With regard to the issue of timeliness, Sec. 111.07(14), Stats., made applicable under Sec. 111.70(4)(a), Stats., bars a person from proceeding under MERA based on an act that occurred more than one year prior to the filing of the complaint. In this case, the original complaint was filed on November 19, 2001. Therefore, any acts alleged to have occurred within the one year prior to that filing date would not be barred. Further, where, as in this case, a complainant alleges a violation of his contractual rights by the employer and a failure of his exclusive bargaining representative to fairly represent him in that regard, the time does not start to run under the statute of limitations as to both the employer and the union until the complainant has exhausted the contractual grievance procedure or the complainant knows, or has a reasonable basis to know, of the union's act or omission that is the basis of the alleged violation of its duty to fairly represent complainant as to the alleged contract violation and which prevents him from exhausting the contractual grievance procedure. 1/ While the complaint alleges violations of contract by the County by actions that occurred more than one year prior to November 19, 2001, it also alleges that the act or omission of the Union related to Complainant's grievances regarding those alleged violations occurred within that one year period. Thus, those allegations cannot be dismissed on their face as untimely.

1/ See the Commission's discussion in LOCAL 950, INTERNATIONAL UNION OF OPERATING ENGINEERS, DEC. NO. 21050-C (WERC, 7/84) and DEC. NO. 21050-F (WERC, 11/84).

As to bases 2 through 6 offered by the County, the complaint alleges that the County violated his contractual rights in violation of Sec. 111.70(3)(a)5, Stats., and that the Union failed in its duty to fairly represent him with regard to those alleged violations by not taking his grievances to arbitration (thus precluding him from exhausting the contractual grievance procedure) in violation of Sec. 111.70(3)(b)1, Stats. 2/ The Commission has jurisdiction to decide such claims under Sec. 111.70(4)(a), Stats., although to proceed with the claim of a contract violation against the employer where the contractual grievance procedure has not been exhausted, the complainant must first prove that the union breached its duty to fairly represent him. MAHNKE V. WERC, 66 WIS. 2D. 524, 533 (1975). The complaint raises issues of both

2/ The Examiner also reads the complaint as seeking enforcement of the contract as written (albeit as the Complainant would interpret it) rather than seeking to reform the contract.

fact and law in these regards. Therefore, it would be improper to dismiss the complaint without an evidentiary hearing. 3/

As to the assertion that the complaint is frivolous, that is merely argument at this stage in the proceeding.

3/ That is with the exception of paragraph 7, subparagraphs J and K of the third amended complaint. While those subparagraphs might possibly be read to allege violations of the contract by the County, Complainant does not allege that he exhausted the contractual grievance procedure in those regards or that the Union failed to fairly represent him in those regards. Thus, those allegations do not meet the requirements set forth in MAHNKE, supra, and they have been dismissed.

Dated at Madison, Wisconsin, this 7th day of November, 2002.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

David E. Shaw /s/

David E. Shaw, Examiner

