STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARY BETH VAN LANKVELT and
HORTONVILLE ASSOCIATION OF TEACHERS, Complainants,

vs.

HORTONVILLE SCHOOL DISTRICT, Respondent.

Case 21
No. 60966
MP-3801

Decision No. 30437-A

Appearances:

Herrling, Clark, Hartzheim & Siddall Ltd., by **Attorney Mark McGinnis**, 800 North Lyndale Drive, Appleton, WI 54914.

Godfrey & Kahn, S.C., by **Attorney John Thiel**, 110 West Lawrence Street, P.O. Box 2728, Appleton, WI 54912-2728

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.

ORDER GRANTING MOTION TO DISMISS AND DENYING MOTION TO STRIKE ANSWER

On March 6, 2002, Mary Beth Van Lankvelt and Hortonville Association of Teachers (Complainants) filed a complaint with the Wisconsin Employment Relations Commission wherein they alleged (without citing any specific sections of 111.70, Stats.), that:

> (t)he District unilaterally changed the contract and refuse [sic] to bargain regarding compensation to members of Hortonville Association of Teachers.

On April 23, 2002, Hortonville Association of Teachers requested that Wisconsin Employment Relations Commission initiate grievance arbitration by submitting a panel of five *ad hoc* arbitrators to the District and the Association from which to select one arbitrator to hear and resolve the following dispute:

> The District unilaterally changed the contract and refused to bargain regarding compensation to Mary Beth Van Lankvelt.

The District and the Association selected Arbitrator Milo G. Flaten to heard and resolve the above grievance.

Following the March 6, 2002 filing of the instant complaint, WERC staff attempted to conciliate the matter but these attempts failed and on July 19, 2002, the case was assigned to Hearing Officer Sharon A. Gallagher. On August 8, 2002, the Commission appointed Examiner Gallagher and she issued a Notice of Hearing on that date for the complaint to be heard October 14, 2002. However, given the fact that Arbitrator Flaten had scheduled a hearing on the underlying grievance for October 8, 2002, the parties requested that the instant complaint be held in abeyance, pending issuance of the Flaten Award. Accordingly and by agreement of the parties, a Notice of Postponement of Hearing was issued on September 3, 2002, rescheduling the instant hearing for December 10, 2002.

On October 14, 2002, the Flaten Award was issued. On November 1, 2002, Respondent filed its Answer herein and on November 4, 2002, Respondent filed a Motion to Dismiss the instant complaint on the ground of claim preclusion. The Examiner requested that Complainants submit brief regarding Respondents' Motion to Dismiss. By agreement of the parties, Complainants filed their brief on December 13, 2002. Along with their brief, Complainants filed a Motion to Strike Respondent's Answer. On December 20, 2002, Respondents filed a letter opposing Complainant's Motion to Strike and requested the opportunity to file a Responsive Brief to Complainants' December 13th brief. The Examiner granted Respondent's request. Respondent filed its Responsive Brief on January 6, 2003, whereupon the record on the Motion was closed.

Having considered the argument of the parties, supporting documents and the record as a whole, the Examiner makes and issues the following

ORDER

Complainant's Motion to Strike Respondent's Answer is denied. Respondent's Motion to Dismiss Complaint is granted.

Dated at Oshkosh, Wisconsin, this 5th day of February, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

HORTONVILLE SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO STRIKE RESPONDENT'S ANSWER AND ORDER GRANTING MOTION TO DISMISS COMPLAINT

On November 4, 2002, Respondent filed a Motion to Dismiss Complaint and supporting affidavit and documents on the ground of claim preclusion. In this regard, Respondent noted that in its April 23, 2002 "Request to Initiate Grievance Arbitration" before WERC, the Association described the grievance as follows:

> The District unilaterally changed the contract and refused to bargain regarding compensation to Mary Beth Van Lankvelt.

Respondent then pointed out that in their complaint, Complainants alleged that Respondent had violated undisclosed sections of 111.70, Stats., as follows:

> The District unilaterally charged the contract and refuse [sic] to bargain regarding compensation to members of Hortonville Association of Teachers.

The complaint referred to a February 25, 2002 memorandum which described "the facts which constitute the unfair labor practice and/or prohibited practice" of the District. The February 25, 2002, memo, a document issued as part of the processing of the underlying grievance, stated that Complainant Van Lankvelt, an Art Teacher at Greenville Elementary School, was not compensated properly pursuant to "District Eight (8) Period Day Policy," Number 5083 (adopted on January 22, 1990).

On October 14, 2002, the Flaten Award was issued. In his Award, Flaten described the dispute as follows:

> The dispute is about compensation for the work hours put in by the Grievant and the application of the collective bargaining agreement in force between the parties ("the contract"). Also involved is a Policy Statement issued by the Employer which governs certain teachers. The Grievant claims the Policy Statement was also violated by the Employer.

As part of his Award, Arbitrator Flaten found that the District had established a policy

> . . . in January of 1990 designed to provide compensation for high school teachers who work an overloaded schedule. That Policy Statement was later extended to middle school teachers without amendment. It was not extended to elementary teachers where the Grievant works.

The Flaten Award also stated the allegation of the grievance, as follows:

> The grievance claimed that the Grievant was not compensated consistent with the provisions of the Policy Statement issued January 22, 1990 regarding teachers who are teaching on a schedule deemed to be overloaded.

In his Award, Flaten concluded (contrary to District argument thereon) that the grievance was timely filed and that the subject matter of the grievance was properly before the Arbitrator as the January 22, 1990 Policy had become "a collateral or side agreement . . .an actual part of the contract . . . ." because ". . . its use by the parties over the years has actually incorporated those provisions into the Contract" (slip op at p. 2).

Arbitrator Flaten then turned to the merits of the grievance and found in favor of the District, as follows:

> In negotiating with the Employer for the instant contract the Union filed a written bargaining proposal to reduce student-teacher contract time. The reduction, the Union claimed, would free up much needed teacher preparation time. The Grievant herself had urged the Union to put forth the proposal and make it part of the current contract. In fact, those urgings became so incessant, the subject was occasionally labeled with the Grievant's name.
>
> As the record and the instant Contract clearly shows, the proposal was rejected. That rejection was eventually accepted by the Union, probably to gain acceptance for something else the Union deemed to be more important. Whatever the reason, the proposal the Union now seeks never became part of the Contract.
>
> Thus, the argument that the Union is attempting to obtain through Grievance arbitration, that which it failed to obtain at the bargaining table is controlling. The doctrine governing this reasoning is similar to the legal doctrine, res judicata, where a matter is finally decided on its merit. Whether it's called that or waiver, the subject of the grievance has already been tried and intentionally relinquished through bargaining contract negotiation.
>
> Decision
>
> The Employer did not violate the Contract when it assigned to the work schedule to the Grievant.
>
> Award
>
> The Grievance is dismissed.

On November 4, 2002, the District filed a Motion to Dismiss the instant complaint on the ground of claim preclusion with supporting documents. Therein, the District contended that Arbitrator Flaten had the exact issue before him in the grievance arbitration case as is before the Examiner in the instant complaint case; that the parties in both actions are identical; and that the Flaten Award is a "final judgment on the merits" by a "court of competent

601 N.W.2D 627 (1999); NATIONAL OPERATING V. MUTUAL LIFE INS. CO., 244 WIS. 2D 839, 868, 630 N.W.2D 116 (2001). The District submitted the grievance documents as well as the Flaten Award with its Motion.

In their December 13, 2002 brief in opposition to Respondent's Motion to Dismiss, the Complainants did not dispute either the facts or the law contained in Respondent's Motion to Dismiss. Indeed, they stipulated that "there is an identity between the parties between the arbitration case and this matter." However, Complainants urged that "this matter is not barred on the theory of claim preclusion based on the fact that there is not an identity between the causes of action in the two separate actions." Complainant noted that "neither party presented issues to the arbitrator with respect to the Respondent's refusal to bargain or Respondent's unilateral change of the Master Agreement . . ." and ". . . Flaten's decision did not address or answer the issue of the Respondent's refusal to bargain or the Respondent's unilateral change of the Master Agreement." In support of their assertions, Complainants provided excerpts from the parties' briefs wherein each listed the issues they wished Arbitrator Flaten to decide. The Association and Van Lankvelt listed the following issues for determination:

1. Has the District violated the Agreement by refusing to compensate VanLankvelt for teaching an overload schedule?

   GREIVANTS' POSITION: Yes. VanLankvelt was assigned an overload schedule and did not receive compensation for the overload schedule.

2. Has the District violated the Agreement by failing to compensate VanLankvelt consistent with compensation paid to other teachers in the District that were assigned an overload schedule?

   GRIEVANTS' POSITION: Yes. VanLankvelt was not treated the same as Mowrer, Hahn, Taycher, Gorwitz, and Draeger. VanLankvelt was not compensated for her overload schedule. Mowrer, Hahn, Taycher, Gorwitz, and Draeger were compensated for their overload schedules.

The District listed the following arbitration issues:

1. Is this grievance timely due to application of Article 5.3.1, Step 1, which requires a grievance be articulated within five days of the event upon which the grievance is based?

2. Is this grievance arbitrable by application of Section 5.1 of the Master Agreement which defines a grievance as "a dispute that concerns the interpretation or the application of a specific provision of the Master Agreement?"

3. Has there been a violation of a specific provision of the Master Agreement as to the Grievant, Mary Beth VanLankvelt?

If so, what is the appropriate remedy?

In their Motion to Strike Respondent's Answer, Complainants asserted that Respondent's Answer (filed November 1, 2002) was untimely filed pursuant to ERC 2.04 of the Wisconsin Administrative Code, which requires an answer to a complaint under the Wisconsin Employment Peace Act (WEPA) to be filed no later than eight days after the mailing by the Commission of the complaint to respondent. On December 20, 2002, Respondent filed a letter response to Complainants' Motion to Strike Answer in which it asserted that the instant case is controlled by ERC 12.03, Wis. Admin. Code, which states that the Answer to a complaint of prohibited practices under Chapter 111.70, Stats., is due "on or before the date designated in the Notice of Hearing" on said complaint. As the Notice of Hearing gave a deadline of November 11, 2002, for the Respondent to file its Answer herein, Respondent urged that Complainants' Motion to Strike Answer must be denied. In addition, Respondent requested an opportunity to file a brief in response to Complainants' Brief in Opposition to Respondent's Motion to Dismiss. On December 27, 2002, the Examiner granted Respondent leave to file a Responsive Brief if filed by close of business on January 15, 2003. Respondent filed its Responsive Brief on January 6, 2003.

DISCUSSION

Motion to Strike Answer

Complainants' Motion to Strike Respondent's Answer must be denied. Complainants put forth just one argument in support of their Motion: that Chapter 2, Section 2.04, of the Wisconsin Administrative Code, requires that an answer to an unfair labor practice complaint must be filed not later than eight days after the Commission's mailing of the complaint to the Respondent, must be applied to this case such that Respondent's answer filed on November 1, 2002 (more than eight days after the Commission's mailing of the complaint to Respondent) must be stricken as untimely.

However, Section 2.04 of the Wisconsin Administrative Code applies only to complaints filed under the Wisconsin Employment Peace Act, Chapter 111.01, Stats. This act at Section 111.02(7), Stats., specifically exempts from coverage "the state or any political subdivision thereof . . . ." Thus, Hortonville School District, which is a political subdivision of the State, is exempt from the coverage of WEPA. Section 111.70(1)j, Stats., of the Municipal Employment Relations Act, specifically applies to "any city, county, village, town, metropolitan sewerage district, school district, family care district or any other political subdivision of the State . . . ." This language demonstrates that Hortonville School District is covered by MERA, not WEPA. See, e.g., WISCONSIN HOUSING AND ECONOMIC DEVELOPMENT AUTHORITY, DEC. NO. 21780 (WERC, 6/84). As such, Chapter 12,

Section 12.01, states that Chapter 12 of Wisconsin Administrative Code applies to prohibited practice complaints concerning municipal employers such as school districts. Section 12.3(2) of the Wisconsin Administrative Code provides that an answer to a complaint under Chapter 111.70 is timely filed if it is served "on or before the date designated therefor in the notice of hearing."

In this case, although the Notice of Hearing (issued on August 8, 2002) originally designated September 30, 2002, as the date by which Respondent's Answer should be served, the Examiner in her September 3, 2002, Notice of Postponement of Hearing indicated that Respondent would be given an extension of time to serve/file its Answer until November 11, 2002, due to the mutually agreed upon postponement of the hearing herein to await the issuance of the underlying grievance arbitration award. Therefore, as Respondent timely filed its answer with the undersigned and served it on November 1, 2002, Complainants' Motion to Strike Answer is denied.

Motion to Dismiss

Respondent has argued that the doctrine of claim preclusion controls this case, that it bars Complainants from proceeding herein and requires dismissal of the complaint. In this regard, Respondent argued that the Flaten Award decided or could have decided all issues contained in the complaint in this case, that the parties to the underlying grievance arbitration case and the instant case are identical and that Arbitrator Flaten's Award constitutes a "final judgment on the merits" of the complaint allegations. NORTHERN STATE POWER CO. V. BUGHER, 189 WIS.2D 541, 550-1, 525 N.W.2D 723 (1995); NATIONAL OPERATING V. MUTUAL LIFE INS. CO., 224 WIS.2D 830, 869, 630 N.W.2D 116 (WIS. 2001); SOPHA V. OWENS-CORNING FIBERGLASS CORP., 230 WIS.2D 212, 233, 601 N.W.2D 627 (1999).

As Examiner McGilligan found in CITY OF NEW LISBON, DEC. NO. 29885-A (MCGILLIGAN, 8/00), SLIP OP. AT PAGE 5:

. . .

> Claim preclusion is the term now applied to what used to be known as res judicata. This doctrine establishes that "a final judgment between the parties is conclusive for all subsequent actions between those same parties, as to all matters which were, or which could have been, litigated in the proceeding from which the judgment arose." DANE COUNTY V. AFSCME LOCAL 65, 210 N.W. 2D 268, 565 N.W. 2D 540 (CTAPP, 1997).
>
> The Commission has applied the doctrine of res judicata since at least 1957. WISCONSIN TELEPHONE COMPANY, DEC. NO. 4471 (WERC, 3/57). The Commission has applied the doctrine of claim preclusion in cases arising under the Wisconsin Peace Act, the Municipal Employment Relations Act, MORAINE PARK VTAE ET AL., DEC. NO. 22009-B, (WERC, 11/85), and the State Employment Labor Relations Act. STATE OF WISCONSIN, DEPARTMENT OF

EMPLOYMENT RELATIONS, DEC. NO. 23885-D (WERC, 2/88).

The Commission applies claim preclusion thus:

> (T)he dispute which was the subject of the award and the dispute for which the application of the res judicata principle is sought (must) share an identity of parties, issue and remedy.
>
> In addition, no material discrepancy of fact may exist between the dispute governed by the award and the subsequent dispute. WISCONSIN EDUCATION ASSOCIATION COUNCIL ET AL., DEC. NO. 28543-B (WERC, 12/97). 1/
>
> . . .

1/ The following WERC cases are in accord with the above: D.C. EVEREST AREA SCHOOL DISTRICT, DEC. NO. 29946-A (BURNS, 8/00); MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/98); RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29184-A (SHAW, 11/97).

Complainants, although resisting Respondent's claim preclusion argument, have stipulated herein that there is an identity between the parties in the arbitration case and in this matter (Compl. Brief, page 1). In addition, Complainants have not argued herein that Arbitrator Flaten's Award is not a final judgment on the merits. 2/ Rather, Complainants sole argument against the Motion to Dismiss is that because there is no identity of issues or causes of action between the arbitration case and the instant matter, the doctrine of claim preclusion cannot bar litigation of the instant complaint.

Specifically, Complainants note that their issues at arbitration were whether the District violated the Master Agreement by not paying Van Lankvelt overload pay or whether the District violated the contract by failing to compensate Van Lankvelt consistently with compensation of other teachers who had received overload pay. Complainants noted that the Respondent's issues in the underlying grievance arbitration case were timeliness, arbitrability and whether the District's acts toward Van Lankvelt violated a specific contract provision. Therefore, Complainants argue, that because neither party had presented, argued or briefed the issue whether the District unilaterally changed the Master Agreement or whether it refused to bargain with the Association in the arbitration case, the two causes of action (no matter how the arbitration issues are phrased) are different and distinct and claim preclusion cannot bar the instant complaint. Complainants asserted that Arbitrator Flaten did not address or decide the two issues alleged by the complaint.

As Complainants have conceded that there is an identity of parties and have failed to

argue that the Flaten Award is not a final judgment, the sole issue before the Examiner on the Motion to Dismiss is whether there is an identity between the two causes of action. As Examiner Shaw noted in RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29184-A (SHAW, 11/97), SLIP OP AT PAGE 7:

. . .

> . . . Wisconsin has adopted the "transactional approach." NORTHERN STATES, supra, DEPRATT 2/, supra. In DEPRATT, the Court cited the following commentary to Restatement (Second) of Judgements, Sec. 24:
>
> > The present trend is to see [sic] claim in factual terms and to make it coterminous with the transaction regardless of the number of substantive theories, or variant forms of relief flowing from those theories, that may be available to the plaintiff; regardless of the number of primary rights that may have been invaded; and regardless of the variations in the evidence needed to support the theories or rights. The transaction is the basis of the litigative unit or entity which may not be split.
> >
> > (113 Wis. 2d. at 311), cited with approval, NORTHERN STATES, 189 Wis. 2d at 554.
>
> In NORTHERN STATES, the Court held:
>
> > Thus, "if both suits arise from the same transaction, incident or factual situation, [claim preclusion] generally will bar the second suit.'" (citations omitted).

. . .

2/ DePratt v. West Bend Mutual Ins. Co. 113 Wis.2d 306, 334 N.W.2d 883 (1983).

The Complainants have also conceded that the same underlying set of facts relied upon in the grievance arbitration case are relied upon in the complaint case. In this regard, I note that the complaint specifically refers to the February 25, 2002 Memorandum to the Board of Education to detail the "facts which constitute the alleged . . . prohibited practice" herein. This February 25, 2002 document was put in the record before Arbitrator Flaten and he identified it his Award as the grievance (Flaten Award, page 2). In the Examiner's view, despite Complainants' resistance herein, the factual situation upon which both cases are based is identical.

Complainants have argued that because they did not specifically allege unilateral conduct or a refusal to bargain before Arbitrator Flaten, the second requirement of the application of doctrine of claim preclusion has not been met. I disagree. In his Award, Arbitrator Flaten specifically found that the Association and the District negotiated during bargaining for the applicable labor agreement over the Association's written proposal to reduce student-teacher contact time. As Arbitrator Flaten stated,

> In negotiating with the Employer for the instant contract the Union filed a written bargaining proposal to reduce student-teacher contact time. The reduction, the Union claimed, would free up much needed teacher preparation time. The Grievant [Van Lankvelt] herself had urged the Union to put forth the proposal and make it part of the current contract. In fact, those urgings became so incessant, the subject was occasionally labeled with the Grievant's name.
>
> As the record and the instant Contract clearly shows, the proposal was rejected. That rejection was eventually accepted by the Union, probably to gain acceptance for something else the Union deemed to be more important. Whatever the reason, the proposal the Union now seeks never became part of the Contract.
>
> Thus, the argument that the Union is attempting to obtain through Grievance arbitration, that which it failed to obtain at the bargaining table is controlling. The doctrine governing this reasoning is similar to the legal doctrine, res judicata, where a matter is finally decided on its merit. Whether it's called that or waiver, the subject of the grievance has already been tried and intentionally relinquished through bargaining contract negotiation.

The above-quoted excerpt demonstrates that although Arbitrator Flaten did not specifically have before him issues of refusal to bargain and unilateral change, he found no violation of the contract by the District and hence no unilateral change could have occurred. Put another way, had the Arbitrator found that the District had engaged in unilaterally changing the labor agreement, he would have had to find a violation of the contract. Therefore, the issue whether the District made a unilateral change has already been decided by Arbitrator Flaten and he has found that no such change occurred.

In regard to the complaint issue whether the District refused to bargain concerning Van Lankvelt's terms and conditions of employment, the Examiner notes that the Arbitrator found that the parties met and exchanged proposals regarding Van Lankvelt's situation but that the Union dropped it's proposal or otherwise failed to obtain language which had been urged specifically by Van Lankvelt and labeled with her name at negotiations. Flaten's specific ruling in his Award that the Association was attempting to obtain through grievance arbitration what it had failed to obtain at the bargaining table shows that he found that the District did not make an unilateral change or refuse to bargain regarding Van Lankvelt's pay. Indeed, Flaten's reference to the doctrine of *res judicata* or waiver and his reference to the Association's intentional relinquishing at bargaining of the issue that was the subject of the grievance, puts this matter completely to rest. Arbitrator Flaten's Award makes clear that the parties engaged in good faith give and take during negotiations; and he found no refusal to bargain and no unilateral change.

Although Complainants did not argue the point, Commission precedent requires an identity of remedies between the arbitration case and the complaint case. CITY OF NEW LISBON, SUPRA. In their grievance, Complainants sought that Van Lankvelt "receive additional compensation" and that she be treated "fairly and consistently." In their complaint, Complainants sought "compensatory damages including lost wages" and that the District "be prohibited from treating teachers unfairly in the future."

In analyzing whether there is an identity of remedies, the Examiner notes that Complainants referred only to the February 25th memo to flesh out the facts upon which they based their compliant. In doing this, Complainants thereby restricted themselves, to arguments and claims raised in the grievance, which dealt solely with Van Lankvelt's pay. Therefore, Complainants' remedy request for a "compensatory damages including lost wages," and that the District "be prohibited from treating teachers unfairly in the future" is necessarily limited by the facts contained in the February 25th memo which refer only to Van Lankvelt's alleged entitlement to overload pay. In addition, it is significant that no other allegedly entitled employees were named in the February 25th memo. Rather, the February 25th memo described Van Lankvelt's work schedule as unique among District Elementary school teachers and it indicated that although the District had applied the "Eight Period Day Policy" to high school and later to middle school teachers in granting them overload pay, it had refused to apply same to elementary school teachers. In these circumstances and given Arbitrator Flaten's failure to find any contract violation in the underlying grievance arbitration case, the Examiner believes that the remedies sought/available in the two cases are identical. 3/

3/ Importantly, Complainants did not request an order to bargain in good faith in their complaint nor did they request a return to the <u>status quo ante</u> therein, as part of the remedy sought.

Under the "transactional approach," used by the Commission concerning the identity of issue, I find that both the grievance arbitration and the instant complaint arise from the same transaction, incident or factual situation regardless of the availability of various substantive legal theories and the variations in evidence needed to support those theories, that the underlying transaction that is the basis of the litigations may not be split and the doctrine of claim preclusion will bar this complaint. As such, Complainant's have had a fair opportunity procedurally, substantively and evidentially to litigate the issue of the District's alleged refusal to bargain and unilateral change before the Arbitrator. As the remedies sought in both cases are also identical, Complainant's are precluded from re-litigating these issues before the Examiner.

Respondent's Motion to Dismiss is granted.

Dated at Oshkosh, Wisconsin, this 5th day of February, 2003.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

SAG/anl
30437-A.doc