

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MARATHON TEACHERS ASSOCIATION, Complainant,

vs.

SCHOOL DISTRICT OF MARATHON, Respondent.

Case 18
No. 63134
MP-4002

Decision No. 30881-A

Appearances:

Priscilla Ruth MacDougall, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Association.

Gary M. Ruesch and Alexis L. Pfeiffer, Quarles & Brady LLP, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, appearing on behalf of the District.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Marathon Teachers Association (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on December 23, 2003, alleging that the School District of Marathon (Respondent) had committed prohibited practices by its failure to process certain grievances to arbitration. On April 13, 2004, the Commission assigned Coleen A. Burns, an examiner on its staff, to hear the case and, on that date, hearing in the matter was scheduled for June 29, 2004. On April 20, 2004, Respondent filed an Answer and a Motion to Dismiss the complaint, along with supporting arguments and, on May 27, 2004, Complainant filed its response to the Motion to Dismiss.

The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

No. 30881-A

ORDER

The pre-hearing Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 15th day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

MARATHON SCHOOL DISTRICT

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS COMPLAINT**

The Complainant argues that the Respondent has a duty to arbitrate the February 7, 2002 suspension of teacher Vicki Marg; the December 16, 2002 suspension of teacher Vicki Marg; and the August 7, 2003 discharge of Marg. With respect to the two suspensions, the Respondent argues that the Commission lacks jurisdiction to order the Respondent to arbitrate because the Complainant failed to exhaust the contractual grievance procedure. With respect to the discharge grievance, the Respondent argues that the Commission should dismiss the complaint because the discharge occurred during a contract hiatus period. Arguing that the parties had agreed to consolidate all three grievances for arbitration, the Complainant disagrees that grievance procedures were not adhered to. Complainant further argues that the issue of whether or not the grievance procedure was adhered to is a matter to be decided by the grievance arbitrator.

Respondent's Motion to Dismiss is governed by Chapters 111 and 227. As Examiner Richard B. McLaughlin stated in ONEIDA COUNTY, DEC. NO. 28240-A (8/95):

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.

...

Chapter 227 does not provide a summary judgment procedure. The right to hearing is explicit, and the dismissal of a contested case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result:

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases . . . (I)t would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or failure of the complaint to state a cause of action. 1/ (cite omitted)

As Examiner McLaughlin found, the Commission has reflected this reluctance to deny hearing in its own case law:

Because of 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 the complainant be entitled to relief. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

With respect to the two suspensions, the Complaint alleges that the two suspensions occurred during the term of a collective bargaining agreement that contained a grievance procedure that culminated in binding arbitration; that the two suspensions were grieved by the Complainant and denied at every step of the grievance procedure by the Respondent; and that Complainant requested a panel of arbitrators. The Complaint further alleges that Respondent then raised procedural issues, including timeliness, with the Association and discharged Marg; that the parties agreed to consolidate the two suspensions and the discharge and take them to mediation; that the parties agreed to go with a panel or to choose an arbitrator of the parties' choosing after the mediation if the mediation failed to resolve the matter; and that, after the mediation did not produce an agreement, Respondent, by its attorney, reiterated its refusal to arbitrate the two suspensions and discharge.

Liberally construing the Complaint in favor of the Complainant, the Examiner is satisfied that the Complaint alleges that Respondent has refused to arbitrate grievances that the parties have agreed to arbitrate. Under Sec. 111.70(3)(a)5, Stats., it is a prohibited practice for Respondent to "violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement"

The Complaint states a cause of action over which the Commission has jurisdiction and may grant relief. Complainant's allegations, if proved, could be found to constitute a prohibited practice within the meaning of Sec. 111.70(3)(a)5 and, derivatively, Sec. 111.70(3)(a)1, Stats. Sec. 111.07(2) (a), Stats, mandates hearing of the alleged prohibited practices.

The remedy sought in the Complaint is to order the Respondent to arbitrate the suspension and discharge grievances. Thus, Complainant's interest is "substantial" and, as Respondent's Answer to the complaint demonstrates, is "controverted by another party." Thus, this is a contested case.

As the arguments of the parties establish, there are material facts in dispute. These disputed facts may not be resolved without an evidentiary hearing.

The complaint presents a contested case requiring a full hearing on the pleadings. Respondent's Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 15th day of June, 2004.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

