STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JERRY M. KLEMA, Complainant,

vs.

WINGRA REDI-MIX, INC., Respondent.

Case 3
No. 58899
Cw-3670

Decision No. 31056-F

Appearances:

Jerry Klema, *pro se*, 4212 Oak Street, McFarland, Wisconsin 53558, appearing on his own behalf.

Peter Richter, Attorney, Stroud, Willink & Howard, LLC, 25 West Main Street, Suite 300, Madison, Wisconsin 53701-2236, appearing on behalf of Wingra Redi-Mix, Inc.

ORDER DENYING MOTIONS

On May 22, 2000, Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) against Wingra Redi-Mix, Inc. (herein "Respondent-Employer") alleging that Respondent-Employer committed unfair labor practices in violation of the Wisconsin Employment Peace Act (WEPA). Specifically, he alleged that the Union representing employees of Respondent-Employer arbitrated a grievance involving him under a collective bargaining agreement between Respondent-Employer and the Union. He alleges that the arbitrator ordered his reinstatement, with back pay and benefits. He alleged that the Union and Respondent-Employer thereafter entered into an "agreement" on that remedy which the Respondent-Employer breached. The Complainant alleged that this conduct violated Sec.111.06(2)(c), Stats., which provision solely relates to violations of WEPA committed by employees and their representatives. The remedy he sought included a request for an order requiring the Respondent-Employer to comply with the agreement by having the Respondent-Employer repay Complainant's unemployment account. The Union was not named as a party in the complaint.

The records of the Commission indicate that Examiner Raleigh Jones had discussions with the Union, identified as Teamsters Local 695, and that the Union declined to participate in proceedings on this complaint. Stroud, Willink & Howard, LLC notified the WERC that it was appearing for Respondent-Employer by letter dated June 15, 2000. Examiner Jones tentatively set the matter for hearing on November 9, 2000, but the hearing was never held. Instead, the matter was held in abeyance at Complainant's request for over 3 years. Ultimately, Respondent-Employer moved to dismiss the matter because of the delay, but did not move to dismiss it on any other grounds. Examiner Jones issued an order dismissing the matter on February 15, 2005, which was reversed by the WERC, by order dated May 27, 2005. The Commission reassigned the matter to the Undersigned for hearing, by a separate order dated July 7, 2005.

This Examiner issued a notice of hearing on July 7, 2005, in the above-entitled matter for a hearing to be held on August 15, 2005, (a date agreed upon by the parties). Respondent-Employer filed a motion to dismiss the complaint on July 11, 2005. The Examiner denied the motion to dismiss with leave to renew at the close of Complainant's case by order dated July 21st, 2005. Complainant issued a subpoena to Scott Soldon, attorney for the Union, who had reviewed the Union's actions in negotiating with respect to the post-arbitration back pay issue. Attorney Soldon filed a motion to quash upon presentation of non-privileged documents. The Examiner granted that motion. Respondent sought Commission review of the Examiner's decision to deny its motion to dismiss decision. The Commission dismissed the interlocutory appeal by order dated August 9, 2005.

The Examiner conducted an in-person pre-hearing conference pursuant to Section 227.44(4), Stats, with the parties on August 23, 2005. He issued a written summary the same day. During the course of that pre-hearing conference, Complainant made a number of arguments in support of his complaint, but amended his position as a result of the discussions and the stipulation as to documents. The parties stipulated to the issues in dispute and to many of the facts. The Examiner renewed his prior decision treating the complaint as amended to allege that the Union violated its duty of fair representation in the negotiation of the verbal settlement agreement. The prior decision also treated the complaint as being amended to allege that the verbal settlement agreement was void because the Union allegedly violated its duty of fair representation. The Examiner granted Respondent the right to file a motion to dismiss the complaint based on the issues of failure to prosecute and improper amendment Near the end of the conference, Complainant became visibly angry and stated: "Forget the whole thing." He then left before the end of the conference and, when asked to stay by the Examiner, insisted on leaving. The Examiner included with his summary of the pre-hearing conference the following notice:

> THE EXAMINER WILL DISMISS THIS CASE UNLESS COMPLAINANT FILES WITH THE WERC, COPY TO OPPOSING PARTY, A REQUEST TO PROCEED WITH FIFTEEN (15) DAYS OF THE DATE OF THIS LETTER."

> [The Examiner notes that Mr. Klema indicated that he will be unavailable during the month of September. If Mr. Klema requests an extension of time to make a decision as to whether to proceed, copy to opposing party, the Examiner will grant a thirty day extension.]

The Examiner received no response to the notice until Mr. Klema sent a letter to the Examiner received September 28, 2005, basically continuing the discussions which occurred at the pre-hearing, but not otherwise requesting that the matter proceed. In response thereto ,the Examiner held a telephonic pre-hearing conference on September 29, 2005, which he summarized by letter the same day. The Examiner denied Complainant's request to have time to think over whether he wanted to proceed. Complainant raised a question as to how he could prove his case without Attorney Soldon as a witness. The Examiner explained the procedures by which he might prove his case and thereupon Complainant expressed a desire to proceed. The Examiner also warned Complainant that the Examiner would dismiss the case, if Complainant again failed to comply with the Examiner's procedural orders, particularly time limits. The Examiner extended the time by which respondent would be allowed to file its motions until October 20, 2005. Respondent filed its motions on October 19, 2005. Complainant replied to the motion on October 21, 2005. Respondent filed a brief response thereto which was received November 3, 2005.

NOW, THEREFORE, it is

ORDERED

1. The complaint filed herein is properly amended to permit an allegation that Teamsters Local 695 violated its duty of fair representation in determining the back pay Complainant is entitled to under the award which is the subject of this complaint.

2. The complaint filed herein is properly amended to permit an allegation that the settlement agreement entered into by Respondent-Employer and Teamsters Local 695 is invalid.

3. The motion to dismiss based upon Complainant's allegedly having abandoned his complaint is denied.

4. A telephonic pre-hearing conference will be held at 9:30 a.m. on November 30, 2005. The Examiner will initiate the call to Complainant at (608) 838-8485 and Mr. Richter at (608) 257-2281. At that time, each party shall notify the Examiner that he is prepared to proceed, each party shall name its final list of witnesses and each party shall confirm that any witness who it intends to subpoena is properly under subpoena.

5. The hearing will be held December 6, as previously scheduled. It will only be postponed for good cause shown beyond the control of the party requesting postponement.

Dated at Madison, Wisconsin, this 15th day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

WINGRA-REDI-MIX, INC.

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS

The procedural history of this case is set out in the order above and will not be restated here, except for the essential facts. The Examiner dismissed Respondent's previous motion to dismiss because there was a material factual dispute which required a hearing. On August 23, 2005, the Examiner conducted an in-person pre-hearing conference on this matter for the purposes specified in Sec. 227.44(4), Stats. The Examiner's August 23, 2005, summary of the pre-hearing conference noted what occurred in the conference and will be explained further herein. Near the end of the conference, as the issues for hearing were identified and narrowed, complainant walked out of the conference stating: "Just forget the whole thing." The Examiner attempted to dissuade him from leaving, but he just drove off. The Examiner issued a notice of intent to dismiss the complaint for failure to prosecute if Complainant did not request that the matter proceed. At that time, the Examiner noted that Complainant had stated he would be out of town the month of September and would be unavailable. The notice of intent to dismiss provided that I would grant an extension of time to decide if he wanted to proceed and if he made the request in the fifteen days allotted. No such request was timely made. On September 29, 2005, Complainant hand delivered a letter stating: "You tell me what is going on?" It also made arguments directed to prior procedural rulings by the Examiner.

POSITIONS

Respondent filed its motion to dismiss on the following bases. 1. Complainant abandoned the prosecution of this case by his conduct attendant to his walking out of the in-person pre-hearing conference and by his failure to respond in a timely and appropriate manner to the Examiner's Notice of Intent to Dismiss. 2. Complainant's complaint should not be treated as amended so as to ostensibly give Complainant standing to pursue his claim. It alleges that Complainant has stated his only complaint is to seek enforcement of the grievance resolution and not to challenge that resolution. It reiterates its position that the Union would be the only real party in interest to have standing to pursue that type of claim. It argues that the issue of the Union's violation of duty of fair representation should be definitively settled by the fact that Complainant did not make that allegation in the complaint. The Union was not named as a party and even a liberal construction does not reveal that the Union is named as a party. Given the time that has passed, it is too late to name the Union as a party. Section ERC 12.02(5), previously cited by the Examiner, only authorizes an amendment of pleadings based upon a request by the Complainant and not on the Examiner's own motion. Section 12.02 applies only to Complaints under MERA and not WEPA. Nothing in Ch.. 2, of the WERC's rules authorizes amendment of the complaint in WEPA proceedings by the Examiner. Similarly, nothing in the complaint can be construed as contending that the underlying settlement is void. Moreover, Complainant's own statements indicate that the Complainant is not arguing that the "settlement" is void. Accordingly, Respondent requests that he complaint dismissed be on the basis that

the Union was not named as a party and on the basis that the complaint fails to allege a jurisdictional basis (union's violation of duty of fair representation) required by the WERC to assert jurisdiction over the settlement agreement.

Complainant responded that Respondent's motion was not filed within the fifteen day time limit the Examiner imposed for said motions in the pre-hearing order. Complainant denies that he disobeyed the Examiner's order contained in the Notice of Intent to Dismiss. Complainant made other arguments which the Examiner concludes are irrelevant to the motion. The response does, however, reiterate the gist of Complainant's complaint. The statement again reiterates Complainant's position that the Union and Respondent intentionally and improperly delayed the computation of his back pay under the arbitrator's reinstatement order past the sixty days for which the arbitrator retained jurisdiction over the back pay issue. It argues that the parties agreed computation of back pay was incorrect. Complainant's position is that he is entitled to an allowance of 16 more hours per month of overtime than that which was allowed by the parties in the settlement. Complainant's response further alleges that the parties, to the settlement particularly the Union, failed to discover that he had his pay check stubs which definitively showed what has prior overtime had been.

DISCUSSION

The hearing on this matter has been delayed over 4 years. After reviewing the October motion of Respondent-Employer and response of Complainant, the Examiner has concluded that the motions should be denied.

1. Complainant's Objection to Timeliness

The Examiner set a fifteen day time limit for Respondent to file its motions. Respondent properly requested an extension of the time limit to file and the same was granted by letter dated August 29. Respondent was directed to file its motions by October 20, 2005. Respondent's motion was filed on October 19 and, therefore, was timely.

2. Abandonment of Complaint

Complainant correctly points out that the foundation of the Examiner's notice of intent to dismiss is based upon Complainant's conduct which appeared to evince intent to abandon his complaint. See, Sec. 227.44(5), Stats, provides for disposition of cases by default of a party. The Examiner is satisfied that Complainant adequately notified him of Complainant's unavailability in the month of September. The Examiner is satisfied that Complainant's letter of September 28 is substantial compliance with the directives of the notice of intent to dismiss. In making this judgment, the Examiner takes into account Complainant's letter which evinces, in no uncertain terms, the fact that Complainant is pursuing his claims. The Examiner notes that Complainant has misunderstood other matters and that his letter indicates misunderstanding of what was required to proceed. Under the circumstances, the Examiner is satisfied that Complainant has substantially complied with the notice of intent and that Complainant has not abandoned his complaint.

3. Objection to Amendment of Complaint

The Examiner has previously treated the complaint as amended and permitted Respondent to file a motion to dismiss on that basis. The amendments allowed were to allow the complaint to allege that the Union violated its duty to fairly represent Complainant with respect to the handling of the computation of back pay under the award and to allege that the "settlement" agreement is void. As noted in the Examiner's previous decision, motion practice is limited before the WERC. However, the WERC will entertain motions to dismiss based upon a failure to state a cause of action or based upon the one-year statute of limitations in Section 111.07(14), Stats. See, WAUSAU INSURANCE COMPANY, DEC. NO. 30018-C (WERC, 10/03). The limits on WERC motion practice are well stated in DAIRYLAND GREYHOUND PARK, DEC. NO. 28134-B (McLaughlin, 10/95). See, also, BLACKHAWK VOCATIONAL AND TECHNICAL COLLEGE, DEC. NO. 30023-C (Levitan, 5/03), p. 19 et. Seq. As noted below, there are disputed issues of material fact. The Examiner will not use procedural motions as a means to unjustifiably circumvent his responsibility to hold a haring in a disputed case.

Respondent has challenged the authority of the Examiner to amend the complaint himself without a motion by Complainant. Respondent is correct that the current ERC 2.02 is silent regarding amendment of complaints. Section 111.07(2)(a) WEPA provides for amendment of complaints as follows: " . . . any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order thereon.". ERC 2.06 provides form amendments of answers. Nonetheless, the statute governs. Further, the statute does not require that the individual Complainant seek to amend the complaint, but permits the Examiner to do so, where the issues are raised in the proceeding. The WERC has on its own amended complaints to conform to their obvious intent, particularly where the complaining party is unrepresented. See, for example, FOX VALLEY TECHNICAL COLLEGE, DECISION NO. 30669-B (Emery, 2/2004), p.11. Respondent correctly argues, that the right to amend a complaint does not extend the one-year statute of limitations. See METHER V. STATE OF WISCONSIN AND DISTRICT 1199W, UPQHC, SEIU, DECISION NO. 30808-A (Nielsen, 9/2005). The purpose of allowing the amendment is to insure that Respondent has a full notice of the issues which are actually in dispute. See, GENERAL ELECTRIC V. WERB, 3 Wis.2D 227 (1958).

The assumption underlying Respondent's motion to dismiss is that in the absence of the amendment to the pleading, the WERC would be without jurisdiction to proceed. Respondent relies upon the wording of BODH V. G.H. PRODUCTS, DEC. NO. 17630-B (WERC, 1/82). The decision reversed an examiner's decision finding that an individual employee not directly a party to the arbitration had standing to seek enforcement of an arbitration award in his favor even though the party-union did not actively participate in the effort. The WERC, following its well established case law, applied federal substantive law to conclude that an individual employee lacked standing to pursue his complaint under Section 111.06(1)(f), Stats. It noted that the complainant therein "has not alleged" that union's decision to not seek enforcement of that award violated it duty to fairly represent him. BODH, *Supra*, remains the correct interpretation of federal law. See, CLEVELAND V. PORCA CO. 147 LRRM 2385 (7th Cir., 1994)

The WERC has long standing policy that individual employees are proper "parties in interest" within the meaning Section 111.07(2)(a), Stats., to prosecute a complaint for violation of collective bargaining agreement under Section 111.06(1)(e), Stats. See, WEYAUWEGA JT. SCHOOL DISTRICT, DEC. NO. 14373-B, D (WERC, 7/78); BROOKSIDE CARE CENTER, DEC. NO. 20790-A, B (WERC, 2/84). Issues raised in this case concerning the standing of the individual employee are ones of substantive case law, and not statutory jurisdiction. It is the policy of the WERC that the responding employer must raise the issue of the exclusivity of the grievance procedure and the employee's failure to exhaust the grievance procedure as affirmative defenses. Only then must the employee prove that there has been a violation of the duty of fair representation. The issue need not be pled, but only must be raised in the proceedings. See, MAHNKE V. WERC, 66 Wis.2D 524 (1975). In BODH, *Supra*, the parties therein agreed to have the issue of standing decided by motion to dismiss. Complainant has not agreed to have the issue decided by motion. Accordingly, the Examiner is required to hold a hearing to determine the issue. See, MAHNKE, *Supra,* p. 533, et seq.

Section 111.07(2)(a), Stats, requires that a complaint be filed on a form provided by the WERC. Section ERC 2.02(3), of our rules requires only that a complaining party provide a "clear and concise statement of the facts constituting the alleged unfair labor practice. . . ." It does not require a statement of every alternative theory of law for the unfair labor practice. The WERC does not necessarily require that an employee state a duty of fair representation allegation in a complaint, as long as the allegation is raised as it may be necessary in the proceedings. See, MAHNKE, *Supra*. Complainant has made statements in his September 28 letter that the Union deliberately, not accidentally, cheated him out of his rightful back pay. He alleged in his August 8 letter that Union Representative Hermann intentionally did not tell him when the arbitration case was scheduled to be heard. He has otherwise alleged that he had frequently challenged Mr. Hermann's handling of negotiations and that Mr. Hermann was hostile to him as a result of that behavior. The Examiner is satisfied that Complainant is alleging that the Union violated the duty of fair representation in the handling of the settlement agreement.

Respondent's motion also assumes that the Union is a necessary party. The WERC has no policy requiring that a Union be named as a party in complaints under Section 111.06(1)(f), Stats, even though a complaining party is alleging that a union violated its duty of fair representation. It has routinely processed cases processed that way. See, for example, KENOSHA AUTO TRANSPORT CORPORATION, DEC. NO. 19081-B, C (WERC, 1/83). Respondent has never sought to include the Union as a party. The Examiner has provided a courtesy copy of the complaint to the Union. The Union has not sought to intervene. The parties have agreed that Union Representative Hermann is the appropriate witness, not the Union's attorney. Mr. Hermann is available by subpoena. Under the circumstances, there is no prejudice to the Respondent by this case proceeding without having the Union as a named party.

Respondent has similarly challenged the right of the Examiner to recognize by granting the amendment to the complaint that the validity of the "settlement agreement" is in issue. This argument goes to the scope of the original complaint. The Examiner notes that neither Section 111.07, Stats, nor, Sec. ERC 2.02, of our rules requires a complete statement of the remedy sought. Respondent cites the complaint and Complainant's most recent letter for the proposition that the Complaintant only seeks enforcement of "the" settlement. At first blush Respondent's argument on scope would seem to be correct. The complaint alleges: "There was an arbitration award that ordered my reinstatement, backpay and benefits. The union and employer reached an agreement on the remedy terms and the employer has violated that agreement." Complainant has made a wide range of arguments in this case, many conflicting with others. Nonetheless, one of his positions underlying many of his assertions is that there were two settlement agreements. See, Mr. Klema's letter to Ms. Hoeschen dated August 22, 2005. He had always alleged that the first was legitimate, but the second was deliberately and malevolently done to deny him some of his back pay, although he agrees that they correctly calculated it in most respects. He appears to have changed that position only at the pre-hearing conference and the Examiner views his positions as still inconsistent on that subject. Respondent could be correct that his theory is that he is entitled to rely upon the validity of the agreement, but not bound by the parts which did not give him everything he was entitled. His alternative theory remains that the "second" agreement was the result of misconduct by the Union, but that it is correct with respect to all back pay issues other than the allowance for the overtime pay he would have earned had he not been discharged. A hearing is necessary to determine what the factual basis is for his positions.

The Examiner concludes that this case involves disputed issues of fact and law. The hearing will be conducted on December 6, pursuant to the notice previously issued. A courtesy copy of this decision is being furnished to the Union. The Examiner notes that he has made it clear in his September 29 letter that he will not allow the WERC's procedures to be used to abuse the opposing party. Complainant has had an ample opportunity to name and subpoena his witnesses. The hearing will proceed on December 6 and will be postponed only for extraordinary circumstances beyond the parties' control. I have scheduled a telephonic pre-hearing conference at which time the parties will be prepared to proceed. Complainant is notified that his Complaint may be dismissed on motion of the other party if he is not prepared to proceed, unless the circumstances are not within his control.

Dated at Madison, Wisconsin, this 15th day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

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