STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIM MCKEON, Complainant,

vs.

JOSEPH G. REED, Respondent.

Case 29
No. 63359
MP-4030

Decision No. 31098-A

Appearances:

Melissa A. Cherney, Staff Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, WI 53708-8003, on behalf of the Complainant.

Michael J. Julka and **Richard Verstegan**, Attorneys at Law, Lathrop & Clark, 740 Regent Street, Suite 400, Madison, WI 53715, on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS

On February 16, 2004, Complainant filed a complaint with the Wisconsin Employment Relations Commission wherein he alleged that during the hiatus period following the expiration of the 2001-03 labor agreement ". . . by revoking the established standard for calculating full and part time positions, the District unilaterally changed the status quo on wages, hours, and conditions of employment . . ." On October 1, 2004, a Notice of Hearing issued setting the hearing herein for November 16 and 17, 2004.

On October 13, 2004, Respondent filed an Answer admitting and denying the complaint allegations and pleading certain affirmative defenses, including a request to defer the complaint allegations to arbitration but not asserting the statute of limitations as an affirmative defense.

On November 5, 2004, Respondent filed a Motion to Dismiss and to stay the hearings along with brief in support thereof. The Examiner (who had been appointed by the Commission on October 1, 2004) requested that Complainant file a brief in response to Respondent's Motion, which it filed on November 30, 2004. On November 23, 2004, Respondent also filed a letter stating it would not waive any procedural or other defenses related to any underlying grievances relevant to this case.

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

ORDER

The pre-hearing Motion to Dismiss is denied.

Dated at Oshkosh, Wisconsin, this 22nd day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/

Sharon A. Gallagher, Examiner

DODGELAND SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS

On November 4, 2004, Respondent filed a Motion to Dismiss with supporting brief. Complainant filed its response thereto on November 30, 2004. The parties' positions on the Motion are summarized as follows.

POSITIONS OF THE PARTIES

The District

Respondent noted that the named Respondent, Superintendent Joseph G. Reed, is not a "municipal employee" within the meaning of Sec. 111.70(1)(i), Wis. Stats., as required to charge a violation of Sec. 111.70(3)(b)3 and 4, Wis. Stats., and that District Superintendent Reed is a supervisory/managerial/executive employee under the law. Even if the Commission allows the amendment of the instant complaint to substitute the District as Respondent for Reed, an individual, and to allege a violation or violations of Sec. 111.70(3)(a), Wis. Stats., alleging a refusal to bargain/unilateral change violation, Respondent argued that the statute of limitations would bar consideration of such amended complaint because the amendment would create a new cause of action. This would require that the statute of limitations would run from the date of the amendment, not from the original filing date of the complaint.

In the alternative, Respondent urged that the complaint must be dismissed because the Complainant is barred from pursuing the complaint allegations under the doctrine of claim preclusion. In this regard the Respondent argued that various court and commission cases recognize that a final judgment in a prior matter is conclusive in a subsequent matter if there is (1) an identity of parties/privies, (2) an identity of causes of action, and (3) a final judgment on the merits in the prior matter. Also where a party in the prior matter has sought both a declaratory ruling and has requested coercive relief (such as a writ of mandamus), claim preclusion applies to bar not only claims decided in the first case but also claims that could have been but were not litigated therein. 1/ The courts have applied a transactional analysis, requiring that all claims arising out of the same transaction or factual situation comprise a single cause of action and must be tried together.

1/ Respondent cited RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 29814-A, (SHAW, 11/97); STERICYCLE V. CITY OF DELAVAN, 929 F.SUPP. 1162, 1163 (E.D. WIS, 1996), AFF'D 102 F. 3RD 657 (7TH CIR., 1997); DEPRATT V. WEST BEND MUT. INS. CO., 113 WIS.2D 306, 310, 334 N.W.2D 883 (1983).

Here, the District brought the prior action seeking a declaratory ruling that its former guarantee of two hours prep time to its professional teachers was a permissive subject of bargaining (DODGELAND ED. ASSOC., DEC. NO. 29490 (WERC, 1/99). Respondent argued herein that the amount and method of determining compensation were central to the DR case and to this case, as the Association's impact proposal is identical to the request for relief herein. However, the Association made no request in the prior case that the Commission rule upon compensation issues in the DR proceeding. As claim preclusion requires that parties raise all relevant claims arising out of the transaction in one proceeding, and as the complaint allegations and those of the prior DR arose out of the District's decision to end its practice of guaranteeing prep time, Respondent urged that the Commission must dismiss the complaint allegations because they should have been litigated in the prior DR proceeding.

Respondent also contended that the Commission must dismiss Complainant's allegations as the exclusive remedy for same lies in grievance arbitration and the Complainant failed to exhaust its remedies in arbitration. Respondent detailed the pending grievances it argued addressed the same issues as the instant complaint, as follows:

. . .

> 1. November 12, 2003 Level III grievance arguing that "the Board of Education and/or its authorized representatives violated the Master Agreement and past practice by requiring teachers to perform a 7th period involuntary overload assignment and then failing to compensate the teachers for that overload";
>
> 2. November 12, 2003 Level III grievance arguing that "the Board of Education and/or its authorized representatives violated the Master Agreement and past practice by assigning a 7th period class resulting in an overload for Marcia Modaff and then failing to compensate her for that overload";
>
> 3. November 11, 2003 Level III grievance arguing that "the Board of Education and/or its authorized representatives violated the Master Agreement and past practice in the manner it is now calculating preparation minutes";
>
> 4. November 11, 2003 Level III grievance arguing that "the Board of Education and/or its authorized representatives violated the Master Agreement and past practice in the manner it has calculated the full time status for elementary specialists for the 2003-2004 school year";

. . .

As the Association failed to exhaust its remedies at arbitration and no exceptions to requiring exhaustion exist here, Respondent urged that the Commission must dismiss the complaint in this ground.

Respondent next argued that the Commission should defer the complaint allegations to grievance arbitration and dismiss the complaint as there is substantial probability that such a submission will result in a resolution of Complainant's Sec. 111.70(3)(b)3 claims that is not repugnant to MERA. However, on November 23, Respondent's counsel advised that the District would not be willing to waive any procedural defenses it has to further processing of the above-listed grievances if the Commission decided to defer the complaint issues to arbitration, assuming the Commission denied Respondent's Motion to Dismiss.

Association Response

The Association argued that the Commission should not dismiss the instant complaint based purely upon technical error where, as here, there is no dispute that the District was clearly and timely apprised of the specifics of the allegations against it. In this regard the Association quoted from the complaint at length urging that it was the District's actions which Complainant alleged violated MERA and which Complainant wanted to remedy. The Association urged that the complaint allegations substantially comply with Chapter ERC 12, Wis. Admin. Code, and that the District "puts form over substance in arguing that the complaint should be dismissed based on a lay drafter's citation of the wrong subsection of the statute, and the naming of the primary agent of the Employer as the respondent." (Union Brief, p. 3)

ERC 20.01, Wis. Admin. Code, states that procedural rules shall be liberally construed so as to avoid legalistic traps to snare the "non-attorney representative." As the District has failed to show it has been prejudiced in any way by the minor technical defects contained in the complaint the Motion to Dismiss should be denied and Complainant allowed to amend the complaint to conform to the Administrative Code.

The Association also argued that the complaint is not barred by the doctrine of claim preclusion. It noted that the DR proceeding was filed by the District in 1998. The Association concedes that the preparation time guarantee contained in a 1995-97 MOU (which expired with the 1995-97 labor agreement) evaporated in 1999 with the Supreme Court's decision in the prior DR case. However, the Association asserted that since 1999, the District has had a consistent past practice regarding how it compensated employees for assignments in excess of six periods and how it calculates the percentage of full-time the individual works; and that the evidence in this case would show that in the 2003-04 school year, the District unilaterally changed these practices. Thus, the allegations of the complaint – that the District engaged in illegal acts in 2003 - did not exist in 1999 and they were not litigated in the prior case.

The Association also noted that the *District*, not the Association, filed the prior DR and the "parties voluntarily agreed to have the WERC also issue a declaratory ruling on whether or not the Association's impact proposal was an economic issue." These facts fail to demonstrate a sufficient similarity to cases cited by Respondent to preclude the Association from pursuing the complaint allegations under a claim preclusion analysis because it sought coercive relief in a prior action in which the complaint allegations (assertedly) could have been litigated.

Finally, the Association contended that deferral of the complaint allegations would not be appropriate. At the time the District took its illegal unilateral actions, the parties' 2001-03 contract had expired, which the WERC has held makes deferral unavailable. Moreover, as the District has herein refused to waive any procedural arguments in arbitration, deferral would not be appropriate. The Association, therefore, requests that Respondent's Motion to Dismiss be denied, that Complainant be allowed to amend this complaint and that the case be set for hearing on the merits.

DISCUSSION

Complainant McKeon alleged on a standard WERC complaint form at part C the following "facts which constitute the alleged . . . prohibited practices":

> The Dodgeland Education Association is the sole collective bargaining agent for certified professional teaching personnel, not to include substitute teachers, employed by the Dodgeland School District.
>
> As such, the provisions of Wis. Stats. 111.70 govern the employment relations between the DEA and the Dodgeland School District Board of Education.
>
> The 2001-2003 Master Contract between the Dodgeland School District Board of Education and the DEA expired on June 20, 2003.
>
> The Dodgeland Education Association alleges that during the contract hiatus prior to the 2003-04 school year the District violated Wis. Stat. 111.70 by unilaterally changing the status quo on wages, hours and conditions of employment. Specifically, the District changed the established standard determining what constitutes full and part-time positions.
>
> Established Standard:
> Middle and High School – 6 assignments = 1360 instructional/supervisory minutes per week
> Elementary Specialists – 1360 minutes
>
> '03-'04 District Calculation:
> Middle and High School: 1740 instructional/supervisory minutes per week
> Elementary Specialists: 1590 minutes
>
> The result of that unilateral change in calculation is that the District has violated the standards set for establishing the wages, hours and conditions of employment of all full time middle level/high school teachers, elementary specialists and part time teachers.

> For the 2003-04 the District assigned the middle level/high school teachers a study hall as a seventh assignment. The Association acknowledges the District's right to make such an assignment (Supreme Court of Wisconsin: Case No. 00-0277), but the Association asserts that the established overload standard requires the District to compensate the teachers with an additional one-sixth of their salary. Also, the District has discontinued compensating teachers for additional academic assignments.
>
> For elementary specialists and part-time teachers, the District now requires those teachers to work additional time simply to maintain their contract percentage that was guaranteed when they signed their '03-'04 individual contracts prior to April 15, 2004.
>
> The Association contends that it has ample documentation to prove that the District had established a standard for calculating full time and part time positions and overload pay prior to the District making a different calculation for the 2003-04 school year.

In Section D of the complaint, Complainant then alleged the following violations of MERA occurred based upon the facts alleged:

> By revoking the established standard for calculating full and part time positions, the District unilaterally changed the status quo on wages, hours and conditions of employment. By this action, the District committed a prohibited practice in violation of Secs. 111.70(3)(b)3 and (3)(b)4 of the Wisconsin Municipal Employment Relations Act.

Complainant then sought the following remedy in Section E of the Complaint:

> As the remedy for the prohibited practices noted above, the Wisconsin Employment Relations Commission should declare that the Dodgeland School District Board of Education has committed the prohibited practices alleged above and order the Dodgeland School Board to perform the following: reinstitute the established standard for calculating full and part time positions; compensate teachers at one-sixth their salary for the seventh assignment; compensate the elementary specialists and part time teachers for the extra workload beyond the established standard of 1360 minutes of instructional and supervisory time.

Respondent has argued that the instant complaint must be dismissed because Complainant, in error, charged only the Dodgeland District Administrator, Joseph Reed, as Respondent, and he failed to charge Dodgeland School District with the commission of

prohibited practices. However it is clear from the above-quoted portions of the complaint that Complainant intended to charge the District with the alleged statutory violations because the illegal actions were taken by the District. In addition, Respondent fully responded to the allegations made by Complainant, admitting and denying Sections A and B and paragraphs one, two, and three of Section C of the complaint, as follows:

. . .

> 4. Denies the allegations contained within the fourth, fifth, sixth, and seventh paragraphs under letter C of the Complaint; affirmatively alleges that, during any contract hiatus period prior to and within the 2003-2004 school year, the District did not take any unilateral action in a manner inconsistent with its rights under the status quo, particularly relating to any established standard relating to full-time and part-time positions in the District; affirmatively alleges that there was never an established standard for calculations for full-time and part-time positions between the District and the Association and to the extent there was, it was specifically repudiated by the District.
>
> 5. Denies the allegations contained within the eighth paragraph under letter C of the Complaint; affirmatively alleges that, for the 2003-2004 school year, the District assigned middle school and high school teachers a study hall period in lieu of one of two preparation periods but that the assignment is a permissive subject of bargaining; affirmatively alleges that the District may have the duty to bargain the impact of any assignment of preparation time for middle and high school teachers but that the impact does not necessarily amount to one-sixth of the teachers' salaries.

. . .

It is clear from Respondent's answer that there was no confusion that the violations Complainant charged were against the District and Respondent answered those allegations in those terms. Furthermore, Respondent asserted several affirmative defenses in its Answer, as follows:

. . .

> 10. The Complaint fails to state a claim upon which relief may be granted. The Respondent affirmatively alleges that the Complaint fails to allege sufficient facts to show any violation of Wis. Stat. § 111.70(3)(b)3. or 4. by a municipal employee and fails to identify any relevant contractual provision that has been violated. The Respondent also affirmatively alleges that there is no past practice in the District relating to a right to preparation time or overload and that, to the extent any past practice may have been established, the District

has provided substantial notice that such past practice was repudiated; the Respondent also affirmatively alleges that, to the extent that the Complainant relies on permissive subjects of bargaining in the master contract between the parties, these contract provisions evaporated upon the expiration of the contract.

11. Complainant is barred from litigating his Complaint. The Respondent affirmatively alleges that the Complainant has failed to exhaust the exclusive remedies provided under Article XII, Grievance Procedure, of the master contract between the parties and therefore the Commission lacks jurisdiction over this matter. Alternatively, the Respondent affirmatively alleges that the Commission must defer the claims to the grievance procedures contained within the master contract between the parties. The Complainant also lacks standing to file this action against the Respondent or the District.

12. Complainant has waived rights relating to the allegations set forth in the Complaint or is otherwise precluded from asserting the allegations in the Complaint. The Complainant waived the right to bargain the impact to wages, hours and working conditions relating to any assignment of preparation time through actions, which included failing to request the District to bargaining impact of any assignment. The Complainant also waived rights to any claims under the contract by acknowledging the assignment of preparation time as permissive and proposing impact language but failing to pursue this issue during bargaining. Complainant's allegations are precluded because grievances have been filed relating to the assignment of preparation time and the issues and claims were fully adjudicated under the grievance procedures or are currently pending. Any allegations relating to grievances filed during the 2004-2005 school year lack subject matter jurisdiction or are otherwise invalid.

13. With respect to all the allegations contained in the complaint, Respondents at all times acted in good faith, and with legitimate and valid educational, business and/or safety reasons.

. . .

Again, the above-quoted material clearly demonstrates that Respondent understood and responded to the Complainant's specific allegations against the District. Therefore, Respondent's Motion to Dismiss the instant complaint because Complainant failed to name the District as a Respondent is wholly unpersuasive.

Respondent has argued that the Complaint must be dismissed because complainant alleged violations of the wrong Section of MERA 111.70(3)(b)3 and 4, Stats. Those Sections read as follows:

> (b) It is a prohibited practice for a municipal employee, individually or in concert with others.
>
> . . .
>
> 3. To refuse to bargain collectively with the duly authorized officer or agent of a municipal employer, provided it is the recognized or certified exclusive collective bargaining representative of employees in an appropriate collective bargaining unit. Such refusal to bargain shall include, but not be limited to the refusal to execute a collective bargaining agreement previously agreed upon.
>
> 4. 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 or to accept them terms of such arbitration award, where previously the parties have agreed to accept such awards as final and binding upon them.
>
> . . .

Subsections (a) and (b) of Section 111.70, Stats., contain, in large part, parallel statutory provisions. It is understandable that a layman like Complainant might select Subsection (b) rather than Subsection (a) as the basis of his allegations against the District. As stated above, there is no question that Respondent fully understood the allegations made and that he responded on behalf of the District (as the District would have done) to the substance thereof.

Respondent argued that the statute of limitations bars the amendment of the instant complaint to allege the District as Respondent and to correct the error Complainant made in alleging Subsection 3(b) of 111.70, Stats. Notably, Respondent failed to argue the statute of limitations claim in its Answer. As such, in fairness, Respondent waived this argument by failing to raise it as an affirmative defense in its Answer. CITY OF LA CROSSE, DEC. NO. 29954-C (BURNS 6/01); STATE OF WISCONSIN, DEC. NO. 28222-C (WERC, 7/98). 2/ As the complaint herein was filed February 12, 2004, and alleged statutory violations by the District which occurred on or after June 30, 2003, the complaint allegations were timely when the complaint was filed. 3/

2/ Affirmative defenses should be raised in the answer to the complaint. See. ERC 22.03(4)(b).

3/ In addition, the complaint violations alleged are continuing in nature.

Respondent argued that the theory of "claim preclusion" requires that the Complaint allegations should be dismissed because the Dodgeland Education Association could have raised them in a prior case between it and the District but it failed to do so. Claim preclusion, as Examiner McGilligan stated in CITY OF NEW LISBON, DEC. NO. 29885-A (MCGILLIGAN, 8/00):

> . . . 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).
>
> . . .

For claim preclusion to apply there must be identity of parties, issues and remedy and there can be "no material discrepancy of fact" between the prior and subsequent disputes. WEAC, ET AL, DEC. NO. 28543-B (WERC, 12/97). Clearly, claim preclusion does not apply in this case as there is no identity of parties or issues.

Respondent has also argued that issue preclusion applies herein. As stated in CITY OF NEW LISBON, SUPRA,

> . . .
>
> Issue preclusion is the term now applied to what was formerly referred to as collateral estoppel. It is "a flexible doctrine that is bottomed in concerns of fundamental fairness and requires that one must have had a fair opportunity procedurally, substantively and evidentially to litigate the issue before a second litigation will be precluded."" DANE COUNTY, SUPRA. Although issue preclusion does not require an identity of parties, it does require actual litigation of an issue necessary to the outcome of the first action. MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/23/98).
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> . . .

See also, RACINE ED. ASSOC., DEC. NO. 29184-A (SHAW, 11/97); MILWAUKEE COUNTY, DEC. NO. 28951-B (NIELSEN, 7/98); CLARK COUNTY, DEC. NO. 29480-A (CROWLEY, 3/99); MILWAUKEE COUNTY, DEC. NO. 30351-C (SHAW, 2/03).

Assuming *arguendo* that Respondent's assertion is correct that issue preclusion should be applied to dismiss allegations if they could have been but were not litigated in a prior proceeding, this is not the case here. As Complainant urged in its response to the Motion to Dismiss, Complainant alleged illegal actions taken by the District in 2003 as the basis for the instant complaint. As the prior DR case was decided by the Wisconsin Supreme Court in 1999, actions taken in 2003 could not have been considered by the Court. 4/

4/ DODGELAND EDUCATION ASSOC. V. WERC, 2002 WI 22, 250 WIS.2D 357, 639 N.W. 2D 733.

Furthermore, in its Answer, Respondent specifically denied Complainant's complaint assertion that in 2003, the District unilaterally changed a past practice concerning how it compensated assignments in excess of six periods and how it calculated less than full-time employment. Thus, this issue, central to this complaint, has been joined based upon the documents of record. In these circumstances, Complainant has presented a contested case, requiring a full hearing on the merits. See BROWN COUNTY, DEC. NO. 30393-A (MCGILLIGAN, 8/02).

In addition, it is significant that the Commission has consistently held

> 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, DEC. NO. 15915-B (Hoornstra 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).

As Examiner Shaw stated in MILWAUKEE COUNTY (DPW) ET AL, DEC. NO. 30351-A (SHAW, 11/02):

> Deciding these questions would require a number of determinations as to what might reasonably be inferred from the evidence and whether the evidence presented is sufficient to meet the statutory standard. In the judgement of this Examiner, a decision on whether the Complainant has sufficiently proved up the necessary elements of the prohibited practices it alleges, is best done on the basis of a complete record. While it is true that this could result in

> Respondent's having to unnecessarily present a case in its defense, that burden must be weighed against the considerable delay that would result if the Examiner granted the motion and subsequently was reversed on appeal and the case was remanded for further hearing. The Respondent may ultimately prevail on its arguments and defenses, but it would be premature to decide the issues at this point with a less than complete record and, in the Examiner's estimation, the interests of all of the parties are best served by completing the hearing in these matters before rendering a decision on the merits of the allegations.
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> CITY OF MAUSTON, DEC. NO. 28534-B (WERC, 12/96).

See also, EATON CORP., DEC. NO. 26890-B (BURNS, 6/91); BROWN COUNTY, SUPRA, 30393-A (MCGILLIGAN, 8/02).

Significantly, the Commission has emphasized the importance of interpreting a Complainant's complaint allegations liberally so as not to work a forfeiture of statutory rights. WAUSAU INS. CO., ET AL, DEC. NOS. 30018-C, 30019-C and 30020-C (WERC, 10/03).

Finally, Respondent has argued that the Complaint must be dismissed because the Dodgeland Education Association filed several grievances which it failed to pursue. The Complainant argued that this assertion is untrue and that when the District committed its illegal acts the parties' labor agreement had expired. Again, this issue has been joined by the parties. In addition, as Respondent stated the District would not waive any procedural defenses should its request to defer the issues herein to arbitration be granted, deferral would be inappropriate. 5/

5/ Deferral to arbitration could be appropriate here if the District were willing to waive all procedural defenses.

Respondent requested an award of attorney's fees/costs herein. This remedy is not available to respondents in complaint proceedings and Respondents' request is hereby denied. CITY OF KENOSHA (FIRE DEPT.), DEC. NO. 29715-B (NIELSEN, 5/00) SLIP OP. at p. 24 and cases cited therein.

Dated at Oshkosh, Wisconsin, this 22nd day of February, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Sharon A. Gallagher /s/
Sharon A. Gallagher, Examiner

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