

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

**VIROQUA EDUCATIONAL SUPPORT
PERSONNEL ASSOCIATION, Complainant,**

vs.

VIROQUA SCHOOL DISTRICT, Respondent.

Case 19
No. 63906
MP-4083

Decision No. 31201-A

Appearances:

James G. Birnbaum and Kathryn D. Schmidt, Davis, Birnbaum, Marcou, Seymour & Colgan, LLP, 300 Second Street North, Suite 300, LaCrosse, Wisconsin 54602-1297, appearing on behalf of the Association.

Shana R. Lewis, Lathrop & Clark LLP, P.O. Box 1507, 740 Regent Street, Suite 400, Madison, Wisconsin 53701-1507, appearing on behalf of the District.

ORDER DENYING MOTION TO DISMISS COMPLAINT

Viroqua Educational Support Personnel Association (Complainant) filed a complaint with the Wisconsin Employment Relations Commission on August 12, 2004, alleging that the Viroqua School District (Respondent) had committed prohibited practices by violating a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. On October 18, 2004, the Respondent filed a Motion to Dismiss Complaint. On December 27, 2004, the Complainant filed its Response to the Motion to Dismiss. On January 5, 2005, the Commission assigned Coleen A. Burns, as Examiner to make and issue Findings of Fact, Conclusions of Law and Order in the matter of the prohibited practice complaint filed by the Complainant. The Examiner, having considered the record to date and the arguments of the parties, makes and issues the following

No. 31201-A

ORDER

The pre-hearing Motion to Dismiss is denied.

Dated at Madison, Wisconsin, this 5th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

VIROQUA SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS COMPLAINT

The Complainant asserts that the grievance of Ole James Lee arose after the expiration of the parties' 2001-2003 collective bargaining agreement and prior to the execution of the parties' 2003-2005 collective bargaining agreement; that the Complainant followed the grievance procedure of the expired contract; that the expired collective bargaining agreement does not provide for final and binding arbitration of grievances; that the Complainant has exhausted the contractual grievance procedure; and, that, the Commission has jurisdiction to hear and decide Complainant's allegation that the Respondent has violated a collective bargaining agreement in violation of Sec. 111.70(3)(a)5, Stats. The Respondent asserts that the grievance is subject to the grievance procedure of the 2003-2005 collective bargaining agreement; that this grievance procedure provides for final and binding arbitration; that Complainant has failed to exhaust this grievance procedure because Complainant did not appeal the Level 3 denial to grievance arbitration; and, that, given the Complainant's failure to exhaust its remedies under the grievance procedure contained in the 2003-2005 agreement, the Commission must refuse to exercise its jurisdiction to determine the merits of Complainant's Sec. 111.70(3)(a)5 prohibited practice claim.

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 . . . (It 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 (Hoornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

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” Thus, the Complaint states a cause of action over which the Commission has jurisdiction and may grant relief.

Respondent argues that “at no time did the parties agree that the grievance arbitration provision in the 2003-2005 Negotiated Agreement would not cover the grievance regarding Ole James Lee’s termination.” Whether or not there was such an agreement, or any other agreement regarding the processing of the Ole James Lee grievance, is a question of material fact. Complainant’s denial that the parties mutually intended the grievance arbitration procedure contained in the 2003-2005 to be applicable to the Ole James Lee grievance establishes that 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 5th day of January, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Coleen A. Burns /s/

Coleen A. Burns, Examiner

CAB/gjc
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