

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

VENITA HAMMOND, Complainant,

vs.

**STATE OF WISCONSIN, DEPARTMENT OF CORRECTIONS,
ETHAN ALLEN SCHOOL**, Respondent.

Case 669
No. 64649
PP(S)-353

Decision No. 31384-B

Appearances:

Venita Hammond, 1838 North Oakland Avenue #1, Milwaukee, Wisconsin 53202, appearing on her own behalf.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent.

ORDER ON REVIEW OF EXAMINER'S DECISION

On August 9, 2005, Examiner Karen J. Mawhinney issued an Order Denying Motion to Defer to Arbitration wherein she denied Respondent State of Wisconsin's motion that she defer the complaint filed by Ms. Hammond to an ongoing grievance arbitration proceeding.

On August 15, 2005, Respondent State filed a petition with the Wisconsin Employment Relations Commission seeking review of the Examiner's Order.

On August 24, 2005, the Commission voted to exercise its jurisdiction over Respondent's appeal of the Examiner's interlocutory order and sought argument from the parties, the last of which was received October 18, 2005.

Dec. No. 31384-B

Having reviewed the record and being fully advised in the premises, the Commission makes and issues the following

ORDER

1. Those portions of Ms. Hammond's complaint that allege Respondent State committed unfair labor practices within the meaning of Sec. 111.84(1)(e), Stats., by violating a collective bargaining agreement, are dismissed.

2. The remainder of Ms. Hammond's complaint is held in abeyance pending completion of the ongoing grievance arbitration proceeding.

Given under our hands and seal at the City of Madison, Wisconsin, this 2nd day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

MEMORANDUM ACCOMPANYING ORDER
ON REVIEW OF EXAMINER'S DECISION

THE PLEADINGS

On March 30, 2005, Ms. Hammond filed an unfair labor practice complaint against Respondent State which alleged in pertinent part as follows:

13. The Department's discharge of Ms. Hammond was motivated, at least in part, by vindictiveness, malice, retaliation, and union animus on the part of Division Superintendent Kyle Davidson and at least in part for Ms. Hammond's having previously engaged in lawful concerted activities on behalf of herself and other employees of the Department and Division.

. . .

17. By its March 31, 2004 discharge of Venita Hammond, by its pattern of refusing to process her work-related grievances and by its March 30, 2004 refusal to provide conflict mediation as outlined in the 2002 settlement agreement and by its other non-compliant actions toward the settlement agreement between her and the employer, the Department of Corrections and Ethan Allen school committed several ongoing and continuous (sic) unfair and prohibited labor practices in violation of Secs. 111.84 (1a), 111.84 (1c), 111.84(1e) and 111.84(3) of the Wisconsin Statutes.

On June 22, 2005, Respondent State filed a motion with Examiner Mawhinney requesting that: (1) the complaint be deferred to an existing grievance arbitration proceeding in which Hammond is arguing that Respondent State violated a collective bargaining agreement by disciplining her and ultimately terminating her employment; and/or (2) no jurisdiction be exercised over the complaint because it allegedly parallels the contractual violations being litigated in the grievance arbitration matter.

THE EXAMINER'S DECISION

In her August 9, 2005 Order, the Examiner denied the motion to defer. Citing paragraph 13 of the complaint, she concluded that Ms. Hammond was raising "important issues of law" rooted in the State Employment Labor Relations Act that could not be addressed by a grievance arbitrator's determination of whether Respondent had just cause to discipline and terminate Ms. Hammond. The Examiner did not respond to the Respondent State's request that the complaint be dismissed but did deny Respondent State's motion to defer to arbitration..

DISCUSSION

We look first at Respondent State's contention that some or all of Ms. Hammond's complaint should be dismissed because she is raising issues that parallel those in the grievance arbitration proceeding.

Section 111.84(1)(e), Stats., makes it an unfair labor practice to violate a collective bargaining agreement. However, where there is no alleged breach of the duty of fair representation, and where the parties to the collective bargaining agreement have agreed upon a contractual mechanism for resolution of alleged violations, that contractual mechanism is presumed to be exclusive and the Commission will not assert its jurisdiction over the alleged violations of Sec. 111.84(1)(e), Stats., STATE OF WISCONSIN, DEC. NO. 20830-B (WERC, 8/85). Here, as is evident by the ongoing grievance arbitration proceeding, the Respondent State and the union serving as the collective bargaining representative of employees such as Ms. Hammond have agreed to a contractual mechanism for resolving disputes over whether Respondent State violated the collective bargaining agreement. There is no alleged breach of the duty of fair representation. Therefore, the Commission will not assert its jurisdiction over that portion of Ms. Hammond's complaint alleging violations of Sec. 111.84(1)(e), Stats., and that portion of the complaint is hereby dismissed.

Respondent State's request for dismissal of the remaining portions of the complaint is denied. Ms. Hammond therein alleges that Respondent State took action against her out of hostility toward her lawful concerted activities (Sec. 111.84(1)(c), Stats.) and interfered with her right to engage in such activities (Sec. 111.84(1)(a), Stats.) While, as discussed below, we agree with Respondent State that there likely will be overlap between the grievance arbitration litigation (whether there was just cause for Ms. Hammond's termination) and the complaint litigation (whether her termination was based in part on lawful concerted activity), this agency has the ultimate responsibility for administering the State Employment Labor Relations Act and enforcing the rights contained therein. Thus, dismissal of the non-contract based allegations is not appropriate.

While dismissal is not appropriate, we do have the discretion to hold litigation of these allegations in abeyance pending the outcome of an ongoing grievance arbitration proceeding, where it appears that the arbitrator's award may resolve the dispute in a manner consistent with the statute the Commission administers. STATE OF WISCONSIN, DEC. NO. 15261 (WERC, 1/78). Here, the record satisfies us that there is sufficient potential for such a resolution that it is appropriate to hold this matter in abeyance. Upon issuance of the arbitrator's award, either party may ask us to have the complaint proceed based upon allegations that there are matters not resolved by the award or resolved in a manner that is contrary to the State Employment Labor Relations Act.

In reaching this conclusion, we acknowledge and agree with the expressed views of the Examiner and Ms. Hammond that the statutory rights she seeks to vindicate are of great importance. However, the importance of those rights and our ultimate responsibility to enforce

same do not make it inappropriate to hold the matter in abeyance, where there is ongoing litigation which may resolve the matter in a manner consistent with those rights and our responsibilities.

Dated at Madison, Wisconsin, this 2nd day of November, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner