

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

**BROWN COUNTY MENTAL HEALTH  
CENTER EMPLOYEES, LOCAL 1901,  
AFSCME, AFL-CIO, Complainants,**

vs.

**BROWN COUNTY, Respondent.**

Case 719  
No. 64936  
MP-4170

**Decision No. 31476-A**

---

**Appearances:**

**Mark DeLorme**, Staff Representative, Wisconsin Council 40, AFSCME, appearing on behalf of the Complainant Union.

**John Jacques**, Corporation Counsel, Brown County, appearing on behalf of the Respondent County.

**ORDER DENYING MOTION TO DISMISS COMPLAINT**

On July 5, 2005, Brown County Mental Health Center Employees, Local 1901, AFSCME, AFL-CIO, filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against Brown County. The complaint alleged that Joachim Vetter, an employee represented by the Union, had been discharged from his employment with Brown County. The complaint further alleged that following Vetter's discharge, a grievance was filed which asserted that Vetter was discharged without just cause. The complaint further alleged that that grievance was processed through the parties' contractual grievance procedure, but was not resolved, whereupon it was appealed to arbitration. The complaint further alleged that the County refused to arbitrate the Vetter grievance because the parties' last collective bargaining agreement had expired, and there was a contract hiatus. The Union alleged that "by terminating Vetter without just cause in violation. . . of the parties' 2003-2004 collective bargaining agreement", the County committed prohibited practices within the meaning of

No. 31476-A

111.70(3)(a)4 and 1, Stats., when it “failed to maintain the status quo of the parties’ expired collective bargaining agreement.” By framing the complaint that way (i.e. characterizing the County’s action in discharging Vetter as a status quo violation), the complaint essentially seeks to have the merits of Vetter’s discharge adjudicated by the WERC.

On September 23, 2005, the Commission appointed Raleigh Jones, a member of its staff, to act as Examiner in this matter and to make and issue Findings of Fact, Conclusions of Law and Order, as provided in Secs. 111.07(5) and 111.70(4)(a), Stats.

On October 3, 2005, Respondent County filed a Motion to Dismiss Complaint. On October 20, 2005, the Complainant Union filed its response in opposition to the Motion to Dismiss. Hearing on the complaint is scheduled for November 10, 2005. The County has not yet filed an answer to the complaint. Having considered the motion and the arguments of the parties, the Examiner makes and issues the following

**ORDER**

The Motion to Dismiss is denied.

Dated at Madison, Wisconsin this 27th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

---

Raleigh Jones, Examiner

**BROWN COUNTY (MENTAL HEALTH CENTER)**

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

As noted in this decision's third prefatory paragraph, the Respondent has filed a Motion to Dismiss the complaint.

**POSITIONS OF THE PARTIES**

**Respondent County**

The County contends that its Motion to Dismiss should be granted. It avers that the WERC has no authority to grant the relief requested by the Union (i.e. Vetter's reinstatement) because Sec. 50.065, Stats., prohibits "persons criminally convicted of violent acts against a vulnerable victim, from being employed as a caregiver." The County further contends that the WERC has no subject matter jurisdiction over the regulatory provisions set forth in Sec. 50.065, Stats., and HFS Chapter 12, Wisconsin Administrative Code, because the Department of Health and Family Services has exclusive regulatory jurisdiction over employers, such as Brown County, which are licensed to operate health care facilities. Building on the foregoing, the County avers that in this case, "a caregiver employee was convicted of a violent criminal act against a vulnerable person." While the County does not elaborate on this assertion, or even assert that Vetter is "a caregiver employee", an attachment to the County's motion is a Judgment of Conviction by the Circuit Court of Brown County in Case No. 2004CM000869. That document indicates that on June 9, 2004, Joachim Vetter pled no contest to a Class B misdemeanor charge of disorderly conduct/domestic abuse. That document further indicates that sentencing was withheld, Vetter was placed on probation for 18 months, and he was ordered to pay certain costs. The County implies that this conviction on that charge precludes his employment/reinstatement as a "caregiver" at the County's Mental Health Center. The County therefore asks that its Motion to Dismiss be granted.

**Respondent Union**

The Union contends that the County's Motion to Dismiss should be denied. The Union avers there is obviously a factual dispute over the evidence, and, as a result, a hearing is necessary to present evidence on same. In response to the documents attached to the County's motion (i.e. those documents relating to Vetter's 2004 misdemeanor conviction for disorderly conduct/domestic abuse), the Union avers that the Department of Health and Family Services "has taken no further action against Joachim Vetter and he remains a licensed caregiver." To support that assertion, the Union references a document (attached to its response to the motion) which was apparently printed off the web site for the "Wisconsin Nurse Aide Registry." That document references Vetter by name and states in pertinent part:

This aide is eligible to work in federally certified nursing homes, intermediate care facilities for persons with mental retardation, home health agencies, and hospices. This aide is also eligible to work in hospitals, including critical access hospitals; and facilities that are not certified as Medicaid providers, including nursing homes, nursing homes that serve the developmentally disabled, home health agencies and hospices. This aide has **no substantiated findings** of abuse, neglect or misappropriation of property on the Wisconsin Caregiver Misconduct Registry.

Based on the foregoing, the Union maintains that the claims raised in the complaint are fact-intensive, and best left to a full evidentiary hearing. It therefore asks that the Motion to Dismiss be denied.

### DISCUSSION

The Respondent's Motion to Dismiss is governed by Chapters 111 and 227. Through the operation of Sec. 111.70(4)(a), Stats., Sec. 111.07, Stats. governs the procedures by which prohibited practice complaints are handled. Chapter 227 of the Wisconsin Statutes states the framework common to administrative agency proceedings.

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." This case is a contested case within the meaning of that section.

Chapter 227 does not provide a summary judgment procedure for dismissing a contested case prior to hearing. The right to a hearing under Chapter 227 is explicit, and the dismissal of a case prior to evidentiary hearing is not. That is also the case under MERA (Sec. 111.70, Stats.), and its implementing regulations (ERC 12). That being so, a pre-hearing dismissal of a contested case, whether it is characterized as a motion to dismiss or a motion for summary judgment, is an uncommon result. It is rare that circumstances permit dismissal of a case prior to the conclusion of an evidentiary hearing unless there is a lack of jurisdiction or a lack of timeliness.

In UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, the Examiner opined as follows when ruling on a pre-hearing motion to dismiss:

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.

DEC. NO. 15915-B (Hoorstra with final authority for WERC, 12/77), at 3.

Other Commission examiners have applied that same standard in numerous subsequent decisions. This Examiner will do likewise.

When ruling on a motion to dismiss, an examiner obviously has to consider the underlying facts. Based on the standard just noted, the facts which will be considered here are those alleged in the complaint.

The facts alleged in the complaint can be summarized thus. The Union represents certain employees who work at the Brown County Mental Health Center. Joachim Vetter was in the bargaining unit represented by the Union. Vetter was discharged from his employment with the County in January, 2005. Afterwards, a grievance was filed which alleged that Vetter had been discharged without just cause. That grievance was processed through the contractual grievance procedure, but was not resolved, whereupon it was appealed to arbitration. The County refused to arbitrate the grievance because the parties' 2003-2004 collective bargaining agreement had expired, and there was a contract hiatus. The Union then filed the instant complaint.

My discussion begins with the following comments concerning the WERC's jurisdiction as it relates to this case. The complaint characterizes the County's action in discharging Vetter as a status quo violation. By doing that, the complaint seeks to have the merits of Vetter's discharge adjudicated by the WERC. The Complainant Union has the legal right to that. Here's why. Section 111.70(3)(a)4, Stats., provides, in relevant part, that it is a prohibited practice for a municipal employer

4. To refuse to bargain collectively with a representative of a majority of its employees in an appropriate collective bargaining unit.

As part of its obligation to bargain collectively under that section, a municipal employer is legally obligated to maintain the status quo during a hiatus period after the expiration of an agreement with respect to mandatory subjects of bargaining (i.e. wages, hours and conditions of employment). Employee discipline under a just cause standard falls into the last category just referenced. *BELOIT EDUCATION ASSOCIATION V. WERC*, 73 Wis. 2d 43 (1976). A change in the status quo in those areas during a hiatus period constitutes a refusal to bargain and thus a violation of the section just referenced. Thus, Sec. 111.70(3)(a)4 gives the WERC jurisdiction to hear claims involving alleged violations of the status quo. That being so, the WERC clearly has jurisdiction over the claims raised in the instant complaint.

Notwithstanding the foregoing, the County contends that another state statute, namely Sec. 50.065, Stats., precludes the WERC from granting the relief requested by the Union

herein (i.e. Vetter's reinstatement) because that section prohibits "persons criminally convicted of violent acts against a vulnerable victim, from being employed as a caregiver."

While the County's position relative to that matter may ultimately be sustained, I decline to make that determination now. In my view, it is premature to do so. Here's why. If the Union can prove that Vetter's discharge violated the status quo (as it relates to just cause), a traditional remedy is to reinstate the employee. The County can certainly argue that Sec. 50.065, Stats., precludes reinstatement in this case, but it is far from clear, based on the record developed thus far, if that section applies to these facts and/or precludes Vetter's reinstatement. That being so, when the previously-referenced legal standard is applied here, it cannot be said that "under no interpretation of the facts alleged would the complainant be entitled to relief." On that basis alone, the complaint against the County cannot be dismissed without an evidentiary hearing.

Accordingly, the Motion to Dismiss is denied. The hearing will proceed as scheduled on November 10, 2005.

Dated at Madison, Wisconsin this 27th day of October, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

---

Raleigh Jones, Examiner

REJ/gjc  
31476-A

