

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

THOMAS CORCORAN, Complainant,

vs.

**STATE OF WISCONSIN,
DEPARTMENT OF CORRECTIONS**, Respondents.

Case 680
No. 65137
PP(S)-362

Decision No. 31570-A

Appearances:

Kurt C. Kobelt, Lawton & Cates, S.C., Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of the Complainant.

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

**ORDER GRANTING MOTION
TO AMEND COMPLAINT AND POSTPONING HEARING**

On September 13, 2005, Complainant filed a Complaint of Unfair Labor Practice alleging Respondents had violated Secs. 111.84(1)(a), (c), (d) and (e), Stats., by imposing requirements against Complainant regarding his activities as a representative of Wisconsin State Employees Union (WSEU), AFSCME, Local 2748, affiliated with WSEU Council 24, referred to below as WSEU, in violation of an agreement between WSEU and Respondents and in discrimination against Complainant's rights under contract and under the State Employment Labor Relations Act (SELRA). At least some of these allegations are based on conduct challenged by WSEU in Case 664, No. 64426, PP(S)-349, which was heard in Madison, Wisconsin on April 18, June 1, June 2, June 3, August 25 and August 26, before Examiner Richard B. McLaughlin. The parties filed briefs in that matter by November 30.

On September 20, 2005, the Commission informally assigned William C. Houlihan to act as Examiner in PP(S)-362. On October 13, the Commission informally assigned me to serve as Examiner in PP(S)-362. In an e-mail to the parties dated November 1, I noted that PP(S)-362 "appears to cover matters covered by or related to" PP(S)-349, and asked how the parties wished

to proceed. In a letter filed with the Commission on December 12, Complainant questioned the status of scheduling hearing on PP(S)-362. In a December 13 e-mail, Respondent suggested issuance of a decision in PP(S)-349 should precede setting hearing on PP(S)-362. In an e-mail dated December 13, Complainant suggested setting hearing and that the parties agree "to incorporate the record" in PP(S)-349 "as a joint exhibit." In a December 13, e-mail, I stated my understanding that setting hearing in PP(S)-362 with the incorporation of the record from PP(S)-349 "would obligate me to issue a decision" in PP(S)-349 "without regard to the processing of" PP(S)-362, and that a motion to consolidate the matters "would put the issue to the Commission". Via e-mails exchanged by December 14, the parties agreed that they did not wish to have the matters consolidated and wished to discuss what material from PP(S)-349 should be incorporated into the record for PP(S)-362.

By December 22, 2005, the parties had agreed to include the transcript and exhibits from PP(S)-349 in the record of PP(S)-362. On January 5, 2006, the Commission issued an Order appointing me Examiner in PP(S)-362. On January 5, 2006, I issued a Notice, setting hearing on PP(S)-362 for February 27, 2006.

On February 3, 2006, Respondent filed its answer to the September 13, 2005 complaint, and in an e-mail dated February 6, stated an amendment to its answer. On February 9, Complainant submitted by fax a Motion to Amend Complaint, which it filed on February 10. The Motion urges that the following allegations be added to the complaint:

24. By memorandum dated September 6, Gross required Corcoran to take personal leave to attend hearings conducted on August 25-26 regarding the unfair labor practice charges referred to above in paragraph 21, contrary to the DOC's established practice of treating Corcoran's and other employees' time spent at unfair labor practice hearings as leave of absence with benefits (Code 21).

25. On September 2, Local 2748 filed a grievance alleging that the DOC violated the labor agreement by failing and refusing to accommodate his workload to allow him to meet his responsibilities as President of Local 2748.

26. In September and until Corcoran went on a leave of absence for union business on October 24, the DOC retaliated against Corcoran for the filing of this grievance and his other union activities by increasing his workload, forcing him to work overtime.

27. By email dated September 25, DOC Administrator Sheri Maples disseminated an email to all members of Local 2748 informing them Corcoran was being investigated for potential disciplinary action.

Paragraph 21 of the complaint refers to hearing in PP(S)-349. The parties submitted their positions regarding the Motion via an e-mail exchange on February 9 and 10, 2006.

ORDER

The Motion to Amend filed by Complainant on February 10, 2006 is granted, but hearing set for February 27, 2006 is postponed.

Dated at Madison, Wisconsin, this 15th day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS)

**MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION
TO AMEND COMPLAINT AND POSTPONING HEARING**

The Parties' Positions

The Motion asserts that the amendment does not prejudice Respondent "regarding its trial preparations", since there are no new causes of action. Rather, the amendment concerns "a continuation of the pattern of retaliation alleged", which is not complex and involves the same "DOC officials involved in the conduct previously alleged in the Complaint."

Via February 9, 2006 e-mail, Respondent urges that the Motion to Amend be denied, and "be treated as a separate ULP that will be heard at a different time." In the alternative, Respondent asserts the February 27 hearing be postponed to avoid the prejudice resulting from added preparation, since Respondents' counsel "has other matters besides this matter to handle prior to the hearing date." Via e-mail on February 9, Complainant argued that more "is needed to establish prejudice than complaints about extra work" and that there is "little sense to treat these as a separate proceeding." Via February 10 e-mail, Respondent contended that the allegations of Paragraph 27 add a witness no longer employed by DOC; that the allegations of Paragraph 25 mention a grievance, which demands that Respondent "gather facts and determine witnesses"; that the allegations of Paragraph 25 call into question whether the contractual merit of the grievance will be litigated; and that Paragraph 26 is fact dependent and calls for further investigation. Respondent also questions whether additional testimony by Complainant will further broaden the proceeding. Via February 9 e-mail Complainant denied any "design to wait until the last minute to ambush Respondent", and asserted there was sufficient time to prepare for hearing. Complainant also asserted that if there was a contrary belief "we have no objection to rescheduling the hearing."

Via e-mail on February 10, I offered a response "more practical than legal". I suggested that time spent on reviewing the Motion could more profitably be spent on reviewing PP(S)-349, even though this did not address "your arguments on their merits". I suggested that since "hearing date is fast approaching . . . it might make some sense for me to get a decision out in PP(S)-349, and then we can take up prep issues after you have had a chance to consider its impact on PP(S)-362." The e-mail sought further response from the parties.

Complainant responded in a February 10 e-mail, asserting it would "welcome a decision in PP(S)-349, but given the stakes . . . whoever loses will appeal" anyway. This meant the decision in PP(S)-349 would not affect "whether PP(S)-362 will be heard, although it could affect how it is presented." Urging further delay should be avoided, Complainant requested that the Motion be granted and the February 27 hearing date be kept intact. Respondent reiterated its position in a February 10 e-mail response. In a February 10 e-mail I noted,

I appreciate the prompt responses. My suggestion should not be read to indicate I thought the postponement of PP(S)-362 would be indefinite. Rather it was that the

decision might prove unnecessary. Even if the matter is appealed, it must proceed, from an Examiner's procedural perspective, as if there was no appeal.

That said, I will review the file in PP(S)-362 and address the motion as soon as I can.

DISCUSSION

Sec. 111.84(4), Stats., makes the procedures of Sec. 111.07, Stats., applicable to complaints of unfair labor practices under the SELRA. Sec. 111.07(2)(a), Stats., provides, "Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon."

ERC 22.02 specifies the amendment process by providing,

(5) AMENDMENT. (a) *Who may amend.* Any complainant may amend the complaint upon motion, prior to the hearing by the commission; during the hearing by the commission if it is conducting the hearing; or by the commission member or examiner authorized by the commission to conduct the hearing; and at any time prior to the issuance of an order based thereon by the commission, or commission member or examiner authorized to issue and make findings and orders.

The Commission's January 5, 2006 Order Appointing Examiner brings the determination of the February 10, 2006 Motion to Amend within an Examiner's authority.

Respondent's alternative request that hearing be postponed if the Motion to Amend is granted implicates other portions of the Commission's rules. More specifically, ERC 20.11 provides, "Any party may by motion request that the commission or individual conducting the proceeding take any action which they are authorized to take by these rules." ERC 20.18 addresses "Powers of individuals conducting hearings", and provides,

Individuals conducting hearings shall have the authority to take the following action, subject to these rules within the commission's power . . .

- (6) To regulate the time, place and course of the hearing;
- (7) To dispose of procedural requests or other similar matters . . .

Whittled to the arguments presented here, the issue is whether the Motion to Amend questions "a single controversy" or adds another. If the Motion is granted, more procedural concerns bear on whether the amendment makes the February 27, 2006 hearing date advisable.

There is no dispute that the factual and legal underpinnings to PP(S)-349 and PP(S)-362 are similar. Each concerns, among other points, whether Respondent and WSEU entered an

Respondent has discriminated against Complainant for the performance of those duties. PP(S)-362 alleges a course of conduct arising after completion of the hearing process in PP(S)-349. The complaints are sufficiently similar that the parties and Examiner seriously considered whether they should be consolidated. Under Commission case law, consolidation is beyond an Examiner's authority, see BOARD OF EDUCATION, CLINTON COMMUNITY SCHOOL DISTRICT ET. AL., DEC. NO. 20081 (WERC, 7/84).

Against this background, it is evident that the amendment does not question a separate controversy, but "a single controversy" involving Respondent's conduct toward Complainant in discharging his role as President of the WSEU Local involved in PP(S)-349 and PP(S)-362. Thus, the Motion to Amend the Complaint must be granted. To conclude it poses a separate controversy would only spread the parties' and the Commission's resources farther than is necessary or efficient.

This prefaces the more procedural aspects of the Motion concerning the February 27 hearing date. As Respondent notes, the added allegations implicate the need for at least one witness whose presence was not necessarily required under the original complaint. The added allegations do not concern recent events. To grant the Motion at this point would pose issues regarding whether Complainant secured a tactical advantage by bringing the matters into issue well after they occurred and shortly before hearing. It is not clear that evidentiary hearing on PP(S)-362 will require more than one day, and issues of surprise may unnecessarily prolong the process. In any event, the issuance of a decision in PP(S)-349 may impact the parties' preparation for PP(S)-362. Against this background, the record is better served by granting Respondent's request for a postponement if the Motion to Amend is granted. The Order entered above thus grants the Motion to Amend, but postpones the February 27, 2006 hearing.

Dated at Madison, Wisconsin, this 15th day of February, 2006.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Richard B. McLaughlin /s/

Richard B. McLaughlin, Examiner

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