

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PATRICIA A. LANDIN, Complainant,

vs.

STATE OF WISCONSIN (DEPARTMENT OF CORRECTIONS), Respondent.

and

DISTRICT COUNCIL 24, AFSCME, AFL-CIO, Respondent

Case 776
No. 66505
PP(S)-376

Decision No. 31946-A

Appearances:

Patricia A. Landin, *pro se*, appearing on her own behalf.

Kurt C. Kobelt, Attorney, Lawton and Cates, S.C., 10 East Doty Street, Suite 400, Madison, Wisconsin 53701-2964, appearing on behalf of Respondent-Union.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, Madison, Wisconsin.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On November 29, 2006, Complainant filed a complaint with the Wisconsin Employment Relations Commission (WERC) against the State of Wisconsin, Department of Corrections. (herein "Respondent-Employer") alleging that Respondent-Employer committed unfair labor practices in violation of the State Employment Labor Relations Act (SELRA). Specifically, she alleged that the Respondent-Employer violated a collective bargaining agreement between it and Respondent-Union in violation of Sec. 111.84(1)(e), Stats., by refusing to process two grievances she filed on her behalf to the second step of the grievance procedure of said collective bargaining agreement, one grievance was filed October 13, 2005, and the other May 12, 2006. The substance of the grievances is delineated in the Findings of

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Fact below, but essentially they allege that the Employer maintained a hostile work environment and retaliated against her for filing the grievances. She also sought to have the WERC determine the merits of said grievances pursuant to Sec. 111.84(1)(e), Stats. The remedy she sought includes a request for an order requiring the Respondent-Employer to comply with the agreement by withdrawing discipline against her and ending the hostile work environment.

Complainant requested to amend her complaint to name District Council 24, AFSCME, AFL-CIO as a party (herein Respondent-Union) and to allege that it violated its duty of fair representation in not timely processing the subject grievances to the second step of the applicable grievance procedure. The Examiner, by letter dated February 5, 2007, mailed Respondent-Union a copy of the complaint and notified Respondent-Union it was named as a party, pursuant to Sec. 111.07(2), Stats. The Examiner also notified Complainant that she would have to submit a written amended complaint to make the allegations about Respondent-Union's alleged violation of its duty of fair representation. The Examiner also scheduled an in-person pre-hearing conference pursuant to Sec. 227.44(4), Stats., for February 14, 2007. Just prior to the pre-hearing conference, Respondents notified the Examiner that Respondent-Employer had waived the time limits specified in the grievance procedure for the processing of the two grievances which are the subject of this complaint and that Respondents had scheduled a grievance meeting at the second step of their grievance procedure with respect to the grievances, at which Complainant was to be present. The parties stipulated to postpone the pre-hearing conference. The parties stipulated that the second step grievance meeting was held as scheduled. Respondents thereafter filed motions to dismiss the complaint under the WERC's policy of not exercising its jurisdiction under Sec. 111.84(1)(e), Stats., over grievances which are still actively being pursued in the grievance procedure. Complainant opposed the motion. The Examiner noted to the parties that Complainant alleged, in part, that Respondent "retaliated" against her for filing the grievances which are the subject of the complaint which allegations might be cognizable under other provisions of Sec. 111.84, Stats. He afforded Complainant an opportunity to amend her complaint to make allegations with respect to other provisions of Sec. 111.84, Stats., as well as alleging that Respondent-Union violated its duty of fair representation. Complainant later notified the Examiner that she did not want to amend her complaint in any respect. The Examiner proposed a stipulation of fact with respect to the motion to dismiss which was adopted by the parties with one later amendment by stipulation of all of the parties. The Examiner scheduled the matter for oral argument by telephone conference on February 28, 2007. Complainant thereupon requested to amend her complaint to include allegations concerning a grievance she intended to file in the future. The Examiner notified Complainant that he would not allow the complaint to be amended to include allegations about a grievance not yet filed because the subject would be too different from the allegations which were made in the complaint. The telephonic oral argument on the motion was held February 28, 2007.

FINDINGS OF FACT

1. Respondent Department of Corrections is a subdivision of the State of Wisconsin. It employs employees at various facilities throughout Wisconsin, one of which is a probation and parole office in Waukesha County, Wisconsin.

2. Complainant is an individual who resides at 1007 North Cass Street, in the City of Milwaukee, Wisconsin. At all material times, Complainant was employed by Respondent-Employer in its probation and parole office in Waukesha County.

3. Respondent-Union, District Council 24, AFSCME, AFL-CIO, is a labor organization which represents various employees of Respondent-Employer, including some of the employees at Respondent-Employer's probation and parole office in Waukesha County, Wisconsin.

4. Complainant was in the bargaining unit of employees represented by Respondent-Union at the probation and parole office in Waukesha County, Wisconsin, at all material times.

5. At all material times, there has been a collective bargaining agreement in effect between Respondents with respect to the bargaining unit including Complainant which provides, among other things, for the resolution of disputes involving allegations of violation of the agreement in a multi-step grievance procedure culminating in final and binding, neutral arbitration.

6. On October 13, 2005, Complainant filed a grievance alleging that she was being subjected to a hostile and harassing work environment. The grievance was processed at the first step of the grievance procedure, but was not appealed to the second step until the facts stated below. Complainant contended that Respondent did not answer the grievance at the first step. Respondent-Employer contended it did, and also contended that the grievance was not timely appealed to the second step.

7. On May 12, 2006, Complainant filed a second grievance alleging that the first grievance had not been answered, essentially that she had been improperly disciplined and wanted to be made whole, and, again, seeking that the work environment be made hospitable and harassment-free. This grievance was processed to the first step and was being processed at the second step at about the time the instant complaint was filed.

8. Shortly before February 14, 2007, Respondent waived the time limits for pursuing the grievances which are the subject of this complaint.

9. The Respondents held a second step grievance meeting at which Complainant was present with respect to both grievances on February 14, 2007. Respondent-Union represented Complainant at that meeting. The grievances which are the subject of this

complaint were heard on their merits. The allegations involving lying as part of the contention of hostile work environment were raised by Complainant when she filed the first grievance (No. 154) at the second step in May, 2006, and they were discussed at the February 14, 2007, grievance meeting.

10. Respondents continue to process both of the grievances which are the subject of this complaint in the later steps of the grievance procedure.

Based on the foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. Respondent-Employer is a subdivision of the state and is an "employer" within the meaning of Sec. 111.81(8), Stats.

2. Respondent-Union is a labor organization within the meaning of Sec. 111.80(12), Stats.

3. That since the grievances which are the subject of this complaint are substantively subject to the parties grievance and arbitration procedure and are now being actively pursued by Respondents, the Examiner declines to assert the jurisdiction of the WERC pursuant to Section 111.84(1)(e), Stats., over those grievances.

Based on the foregoing Findings of Fact, and Conclusions of Law, the Examiner makes the following

ORDER

That the complaint filed herein is dismissed, with leave for Complainant to refile should circumstances later arise under over which the WERC would assert its jurisdiction pursuant to Sec. 111.84(1)(e), Stats.

Dated at Madison, Wisconsin, this 5th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

DEPARTMENT OF CORRECTIONS

MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS

The procedural history of this case is set out in the body above and will not be restated here.

DISCUSSION

Sec. 111.84(1)(e), Stats., makes it an unfair labor practice for the state to violate a collective bargaining agreement. However, it has been the long standing policy of the WERC to not assert its jurisdiction over allegations of violation of collective bargaining agreement where the parties' collective bargaining agreement provides for final and binding neutral arbitration, and the grievance procedure has not yet been exhausted. See, AFSCME DISTRICT COUNCIL 48, LOCAL 882 v. MILWAUKEE COUNTY, DEC. NO. 30599-A, *aff'd. by operation of law*, WERC DEC. NO. 30599-B (Dec., 2004).

Complainant again acknowledged at the motion hearing that she did not want to amend her complaint to allege that Respondent-Union violated its duty of fair representation or to allege a violation of any other subsection of Sec. 111.84, Stats. She could not articulate any exception to the above-stated policy. Accordingly, the motion to dismiss is granted. The Examiner is satisfied that the situation represented by this complaint falls well within the policy of not asserting jurisdiction. Therefore, the complaint is dismissed without prejudice to refile. Complainant may refile her complaint should circumstances arise later in the grievance processing over which the WERC would assert jurisdiction to determine a complaint for violation of collective bargaining agreement.

Dated at Madison, Wisconsin, this 5th day of March, 2007.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

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