STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LANCE S. DAVENPORT, Complainant,

vs.

MADISON METROPOLITAN SCHOOL DISTRICT (ART RAINWATER AND JUNE GLENNON) and MADISON TEACHERS INC. (JOHN MATTHEWS), Respondents.

Case 306
No. 67017
MP-4353

Decision No. 32139-D

Appearances:

Lance S. Davenport, 625 North Blackhawk Avenue, Madison, Wisconsin 53705, appearing on his own behalf.

Richard Thal, Lawton & Cates, Attorneys at Law, Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53703-2965, appearing on behalf of Madison Teachers Incorporated and John Matthews.

Heidi S. Tepp, Labor Relations Attorney, Madison Metropolitan School District, 545 West Dayton Street, Madison, Wisconsin, 53703, appearing on behalf of Madison Metropolitan School District, Art Rainwater and June Glennon.

ORDER ON REVIEW OF EXAMINER'S DECISION

On June 4, 2007, Lance S. Davenport filed a complaint with the Wisconsin Employment Relations Commission asserting that Madison Metropolitan School District (District) and Madison Teachers Incorporated (MTI) had committed prohibited practices within the meaning of the Municipal Employment Relations Act. Hearing on the complaint was held September 25, 2007 in Madison, Wisconsin before Commission Examiner Stuart D. Levitan. The Examiner issued Findings of Fact, Conclusions of Law and Order on July 18, 2008, concluding that Respondent MTI had not breached its duty of fair representation to Complainant Davenport by refusing to arbitrate two grievances and, since MTI did not breach its duty, it was not appropriate to reach the merits of Davenport's allegation that Respondent District had violated the collective bargaining agreements. Examiner Levitan dismissed Davenport's claims of prohibited practices on the part of either MTI or the District or both.

Davenport filed a petition for review of Examiner Levitan's decision with the Wisconsin Employment Relations Commission. On October 15, 2008, after considering the petition and argument filed by the parties, the Commission concluded that Examiner Levitan had erred by not allowing Complainant Davenport sufficient opportunity to testify. Given this error, the Commission set aside the Examiner's Findings of Fact, Conclusions of Law and Order and remanded the matter for additional hearing. The Commission rejected Davenport's other claims regarding procedural irregularities, including, among other things, his claim that Examiner Levitan had improperly prevented Davenport from presenting witnesses and that Levitan was not impartial. In its October 15, 2008 order, the Commission appointed Examiner Peter Davis to supplement the record by offering Davenport an opportunity to testify on his own behalf and to permit MTI and/or the District to present any evidence in rebuttal to information that Davenport might present in his testimony. An additional day of hearing took place on January 21, 2009, before Examiner Davis, and Davenport also submitted an additional exhibit on March 10, 2009, followed by all parties providing written argument to the Examiner.

On August 27, 2009, Examiner Davis issued Findings of Fact, Conclusions of Law, and Order, based upon the entire record in the matter, including the testimony and exhibits in that portion of the hearing that had been conducted by Examiner Levitan. Examiner Davis concluded that MTI had complied with its duty of fair representation in handling Davenport's two grievances and, given that MTI had not breached its duty, the Examiner held that he could not assert jurisdiction to determine whether or not the District had complied with the collective bargaining agreements. The Examiner dismissed all claims in Davenport's complaint against both respondents.

On September 15, 2009, Davenport filed a timely petition seeking review of Examiner Davis' decision pursuant to Secs. 111.07(5) and 111.70(4)(a), Stats. All parties thereafter filed written argument the last of which was received on October 29, 2009. For the reasons set forth in the Memorandum that follows, the Commission affirms the Examiner's decision in all respects except those noted in the Order, below.

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

ORDER

A. The Examiner's Findings of Fact 1 through 6 are affirmed.

B. The Examiner's Finding of Fact 7 is affirmed, except the last sentence of said Finding is modified as follows and as modified affirmed:

7. . . . Following the meeting, in February, 2005, Davenport did retire retroactively effective to *some time in the fall of 2004*.[1]

C. The Examiner's Finding of Fact 8 is affirmed, except the last sentence of the first paragraph of said Finding is modified as follows and as modified is affirmed:

8. . . . During that conversation Davenport *commented upon finding both Matthews and Keys together, which comment struck Matthews as an accusation of conspiracy,* and Matthews was angered by that accusation.[2]

D. The Examiner's Findings of Fact 9 through 14 are affirmed.

E. The Examiner's Conclusions of Law are affirmed.

F. The Examiner's Order dismissing Mr. Davenport's complaint is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 1st day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J.M. Bauman did not participate.

---

[1] The Examiner's Finding of Fact 7 had stated that Mr. Davenport's retirement was retroactively effective on September 22, 2004. Mr. Davenport contends that the record does not support a September 22, 2004 retirement date. The record contains evidence that Mr. Davenport's retirement application supports a September 22 retirement date, but there is other evidence suggesting that there may have been a 90-day retroactivity limit regarding the effective date of Davenport's retirement. In any case, the record clearly indicates that Davenport's retirement was effective retroactively to some time in the fall of 2004. It is not necessary to determine the precise date of Mr. Davenport's retirement, since it is clear that MTI believed in good faith that his retirement was effective on or about September 22, 2004 (see Examiner's Finding of Fact 13), that this reasonable belief also comported fairly closely to the actual facts, and that this reasonable belief led MTI to conclude that Davenport would not be eligible for any significant make-whole relief as a result of his retirement.

[2] The relevant portion of the Examiner's Finding of Fact 8 had stated, "Davenport suggested that Matthews and Keys were conspiring against him and Matthews was angered by that accusation." There is little substantive difference between the finding as we have rephrased it and the Examiner's phraseology, but, in response to Mr. Davenport's challenge, we have modified it to conform more closely to the record. Matthews testified that Davenport's actual comment was to the effect of finding Matthews together with School Board official Keys, which Matthews took to be an accusation of conspiracy.

MEMORANDUM ACCOMPANYING ORDER

Mr. Davenport, formerly a substitute teacher in the District, alleges that the District violated the relevant collective bargaining agreement(s) in two ways: first, by failing to give him a permanent contract as a result of his teaching situation in the 2003-04 school year; second, by terminating him from his employment on or about September 22, 2004. The District's contention is that Davenport resigned from his employment on or about that date by failing to respond to the District's routine request for confirmation of intent to continue as a substitute teacher. Davenport contends that he telephoned the District's substitute placement office on September 22, 2004, and left a message confirming such intent to return. The District contends no such message was left and/or received.

MTI, Davenport's collective bargaining representative, filed grievances on both claims. As to the first claim, MTI's grievance requested as a remedy (in substance) that Davenport be given a permanent contract and make whole relief. While investigating and pursuing this grievance, MTI learned that Davenport's situation in 2003-04 would not allow him to obtain a permanent teaching contract, but rather would have entitled him to a temporary contract with certain benefits. MTI settled the grievance on the basis that the District would reimburse Davenport for the difference in pay that he should have received under a temporary contract (approximately $5800) and for the out of pocket medical/dental costs that Davenport could substantiate. The District complied with the terms of the settlement.

Before the first grievance was completely resolved and while MTI was still investigating the second grievance, Mr. Davenport's financial circumstances were such that he felt compelled to retire and collect his pension. In January 2005, he consulted with an MTI advisor about the consequences of retirement, both as to the amount of his benefit and as to effects on his grievances with the District. The MTI advisor informed Davenport that he would no longer have any right to re-employment as of the effective date of his retirement and could not accept any public employment that was offered for at least thirty days after his retirement, which could affect the remedy for his grievance. Shortly thereafter, Davenport retired, retroactively to some time in the fall of 2004. MTI in the meantime continued processing Davenport's first grievance and, in February 2005, filed the second grievance, claiming that Davenport had been improperly terminated. In the process of pursuing Davenport's second grievance, MTI discovered information indicating that Davenport had retired retroactively to September 2004. MTI then sent Davenport a letter, dated June 15, 2005, stating in pertinent part, "[G]iven your active status from the beginning of the 2004-05 school year through September 22, 2004, and the subsequent retirement which affirmed the separation date of September 22, 2004, MTI cannot pursue a make whole remedy in this case, and will, therefore, advise the School District of our withdrawal of our grievance." The letter noted, however, that MTI was still pursuing a resolution of the first grievance.

The Examiner properly set forth the essential elements of the prohibited practices that Davenport has claimed and we wholly adopt the Examiner's recitation of those legal elements and citations and incorporate such by reference here. In brief recapitulation, an employee such

as Davenport, who is represented by a union and covered by a collective bargaining agreement, will not be permitted to obtain a decision from this agency on the merits of his grievances (i.e., his claimed breaches of the collective bargaining agreement) unless he is first able to establish that his union "illegally thwart[ed] his efforts" to resolve those grievances by using the arbitration machinery set forth in the contract for resolution of grievances. (Examiner's decision at 13).

Here, the Examiner found, and we agree for the reasons the Examiner propounded, that MTI pursued Davenport's grievances in good faith, obtained a reasonable settlement of the first grievance, and reasonably withdrew the second grievance on the belief that any effective remedy had been mooted by Davenport's retirement retroactive to some time near the outset of the 2004-05 school year. Given the Examiner's conclusions regarding MTI's conduct, the Examiner properly refused to reach the merits of Davenport's claims that the District had treated him inappropriately during the 2003-04 school year and had terminated his employment.

In his petition for review, Davenport raises a number of challenges to the Examiner's decision. He again raises the claim that he has been denied the opportunity to present witnesses who would support his version of events. This contention was rejected in our September 15, 2008 Order, where we pointed out that, while the agency provides resources and information to assist parties in presenting their cases, it remained Davenport's responsibility to prepare and present his case, including subpoenaing witnesses. He had full opportunity to do so during his first hearing, except for presenting his own testimony, which opportunity was afforded him in his second hearing. Consistent with our September 15, 2008 Order, Examiner Davis permitted the respondents here to present brief rebuttal testimony addressing information Davenport presented in his testimony at the supplemental hearing. We see no error in the Examiner's handling of this issue.

Mr. Davenport also focuses upon the Examiner's and/or MTI's inaccurate conclusion that he (Davenport) had retired on September 22, 2004, whereas in fact his retirement was effective at some later date. As explained in footnote 1, above, Mr. Davenport's focus is misdirected. The actual date of his retirement is less significant than whether MTI reasonably and in good faith believed that his retirement was retroactive to somewhere at or around September 22, 2004. It was MTI's belief, reasonably based, that led MTI to its ultimate conclusion that Mr. Davenport would not be able to obtain a make-whole remedy for his termination grievance.

Mr. Davenport appears to argue that MTI's conclusion about the effect of his retirement was not reasonable, because it was contrary to the advice he contends that MTI gave him in January 2005, prior to his retirement. According to Mr. Davenport, MTI's retirement counselor told him (Davenport) that retiring would not affect his grievances. The Examiner specifically found (Finding of Fact 7) that MTI's retirement counselor informed Davenport in that meeting that retiring "would negatively affect the remedy that might be available as to the

contested resignation." Davenport contends that the Examiner's finding is inconsistent with the record, but in fact the testimony of MTI's retirement counselor (Bill Keillor) supports the Examiner's finding:

> Q. Did you ever make some promise to Lance Davenport that his retirement would not affect his grievances in any way?
>
> A. No, in fact the opposite, I specifically said that if he retired, that any issue he would have after the date of his retirement would be rendered moot, he could not have a retirement that he exercised and then have a claim for further wages beyond his retirement date.

Tr. September 25, 2007, at page 215.

In a similar vein, Mr. Davenport appears to argue that the Examiner should have accorded more significance to MTI's failure to obtain the telephone records that Davenport believes would have supported his claim of having telephoned the District in a timely fashion to confirm his interest in maintaining substitute teacher status. Davenport's arguments on this issue are again misplaced. The Examiner reached no conclusion about whether or not Mr. Davenport telephoned the District as he claimed, or about MTI's efforts in seeking those phone records. Rather, the Examiner found that MTI reasonably and in good faith concluded that the issue of the phone records, along with the termination grievance to which they were related, was mooted by the fact of Mr. Davenport's retroactive retirement.

We do not doubt that Mr. Davenport may have sincerely misunderstood the effect of his retirement upon his second grievance and/or may sincerely believe that MTI misled him about the merits of his grievances. Mr. Davenport, however, bears the burden of presenting sufficient evidence to establish that MTI acted in bad faith or without truly considering the merits of his grievances; the record far from meets that burden. Since MTI has not been found to have failed to represent Davenport fairly regarding the two grievances, we have no basis for reaching Mr. Davenport's claims against the District.[3]

---

[3] To the extent Mr. Davenport has advanced other arguments not addressed expressly in the text, above, those arguments have been considered and rejected. In particular, we note Mr. Davenport's repeated references to Examiner Davis having permitted some improper etiquette on the part of Davenport's opponents at or near the end of the hearing. The record reveals nothing about this alleged incident nor any other improper conduct on the part of the Examiner. We also note Mr. Davenport's contention that Examiner Davis made it difficult for Mr. Davenport to utilize the transcript by charging him excessive costs. Transcript charges for parties to a case are governed by Commission rule ERC 10.08(6) ("Any party requesting the commission to provide a transcript of a commission proceeding shall pay a fee of $8.00 per page or the actual per page fee of the court reporter, whichever is less.") The Commission's practice is to permit parties to review/use the Commission's copy of the transcript during normal Commission business hours, in lieu of purchasing their own copies. Mr. Davenport does not suggest that Examiner Davis deviated from either said rule or said practice. Mr. Davenport has also made several allusions to actual or potential bias, collusion, and/or unethical conduct on the part of counsel to and/or agents of the District and MTI and/or on the part of members of the Commission or its staff. We find no support for any such claims nor any connection between any such claims and the conduct or outcome of the proceedings in this case.

For the foregoing reasons, the Examiner's decision dismissing Mr. Davenport's complaint is affirmed in all respects.

Dated at Madison, Wisconsin, this 1st day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/
Judith Neumann, Chair

Paul Gordon /s/
Paul Gordon, Commissioner

Commissioner Susan J.M. Bauman did not participate.