

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DEWITT WEBSTER, Complainant,

vs.

MILWAUKEE COUNTY and AFSCME, DISTRICT COUNCIL 48,
and its affiliated LOCAL 882, Respondents.

Case 667
No. 68163
MP-4442

Decision No. 32572-B

Appearances:

Dewitt Webster, 3755 North 40th Street, Milwaukee, Wisconsin, 53217, appearing on his own behalf.

Timothy R. Schoewe, Deputy Corporation Counsel, 901 North 9th Street, Room 303, Milwaukee County Courthouse, Milwaukee, Wisconsin 53233, appearing on behalf of Milwaukee County.

Mark A. Sweet, Law Offices of Mark A. Sweet, LLC, 705 East Silver Spring Drive, Milwaukee, Wisconsin 53217, appearing on behalf of AFSCME, District Council 48 and its affiliated Local 882.

ORDER DISMISSING COMPLAINT

On July 23, 2008, Dewitt Webster, herein Webster, filed a complaint with the Wisconsin Employment Relations Commission asserting that Milwaukee County, herein County, had committed a prohibited practice within the meaning of Sec. 111.70(3)(a) 5, Stats. when it “disregarded” an August 1, 2006 grievance arbitration award and that AFSCME, District Council 48 and its affiliated Local 882, herein Union, had committed a prohibited practice within the meaning of Sec. 111.70 (3)(b) 1, Stats. by failing to represent him after the arbitrator’s award.

On August 5, 2008, the County filed a motion to make the complaint more definite and certain as to the County. On August 5, 2008, Webster advised the Commission that he opposed the motion.

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On August 15, 2008, Commission Examiner Michael O'Callaghan granted the motion to make the complaint more definite and certain. By email received August 28, 2008 and documents received August 29, 2008, Webster complied with the Examiner's August 15, 2008 ruling.

On October 1, 2008, the Examiner issued a Notice scheduling a hearing on the complaint for November 10, 2008 and directing that answers to the complaint be filed on or before October 20, 2008. On October 20, 2008, the Union filed an answer denying that it had committed a prohibited practice and alleging that the complaint had been filed more than one year from the date of the alleged violation and thus should be dismissed as untimely. On October 22, 2008, the County filed an answer denying that it had committed any prohibited practice and raising various affirmative defenses.

By letter dated October 24, 2008, the Examiner asked Webster to respond to the question of whether the complaint was timely filed. On November 3, 2008, Webster filed a response. On November 5, 2008, the Examiner wrote Webster and advised him that thus far he had not alleged that the County or Union had done anything within the one year period before his July 23, 2008 complaint and that his complaint would be dismissed unless Webster alleged such facts on or before November 30, 2008. The Examiner therein also postponed the November 10, 2008 hearing.

By e-mail received December 2, 2008, Webster provided additional information about his complaint. On October 14, 2009, Examiner Peter G. Davis replaced Examiner O'Callaghan, provided the Union and the County with a copy of Webster's December 2, 2008 email and asked for any response to be filed on or before October 30, 2009. The County filed a response on October 30, 2009.

Having reviewed the record and being fully advised in the premises, I conclude that Webster has not alleged any act by either the Union or the County that occurred within the one year period prior to July 23, 2008. Therefore, I issue the following

ORDER

The complaint is dismissed.

Dated at Madison, Wisconsin, this 30th day of November, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

**MILWAUKEE COUNTY and AFSCME, DISTRICT COUNCIL 48,
and its affiliated LOCAL 882**

**MEMORANDUM ACCOMPANYING
ORDER DISMISSING COMPLAINT**

In his July 23, 2008 complaint, Webster asserts that the County violated a collective bargaining agreement by firing him on December 22, 2006 (effective September 26, 2006) in disregard of an August 1, 2006 grievance arbitration award overturning earlier discipline and that the Union improperly refused to process a grievance over his discharge to grievance arbitration.

Section 111.07(14) of the Wisconsin Employment Peace Act, which applies to this Municipal Employment Relations Act complaint by virtue of Sec. 111.70 (4)(a), Stats, states that:

(14) The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged.

The alleged untimely filing of a complaint is an affirmative defense that is waived if not raised in a timely manner. STATE OF WISCONSIN, DEC. No. 28222-C (WERC, 9/98). Here, the Union timely raised this defense in its October 20, 2008 answer. ¹

When advised by Examiner O'Callaghan that the complaint would be dismissed as untimely unless Webster could identify alleged illegal conduct by the Union or the County that occurred during the one year prior to the July 23, 2008 filing of the complaint, Webster responded as follows:

This is the response to your letter dated October 24, 2008. As of December 2006, I was not aware that Milwaukee County upheld the discharge decision.

In January of 2007, I was waiting for a response from the union to determine if an appeal would be filed or if they would represent me related to my discharge from Milwaukee County. The Union did not respond with an answer for several months, at which time the Union informed me that they were not willing to file

¹ ERC 12.03(1) provides that affirmative defenses not raised by a timely answer are waived. ERC 10.06(1) and 12.03 (1) provide that service of an answer is achieved only upon receipt by the Commission. The County also raised the untimely filing affirmative defense in its answer dated October 20, 2008 but said answer was not received by the Commission until October 22-after the October 20 deadline for receipt of a timely answer. However, ERC 12.02 (6) b. 6 requires that the Notice of Hearing advise the parties that affirmative defenses not timely raised are waived. The Notice of Hearing in this matter did not contain this statement. Under these circumstances, I conclude it is not appropriate to enforce the waiver provisions of ERC 12.03(1). Thus, the County has also presented a valid affirmative defense as to the timeliness of Webster's complaint.

for an appeal nor would they assist me in any way with the appeal, Therefore (sic) I contacted the Internationals of AFSCME to inform them of the local unions (sic) refusal to file an appeal for me. An investigation was completed on or about March of 2007, the results of the investigation were that the Internationals could not require the local union to file an appeal on my behalf. I was also informed by the Internationals that if I disagreed with the local union not filing an appeal on my behalf that I could file a complaint against my local union.

During the next few months I continuously attempted to contact the local union to determine why they refused to file an appeal, especially (sic) after the arbitrator ruled in my favor and Torosian issued a decision ordering Milwaukee County to remove certain disciplinary (sic) letters from my personnel file, letters which would have exonerated me from all suspensions including discharge.

During this process I was not aware of who to contact related to filing charges or an appeal against (sic) Milwaukee County.

In August or September of 2007, I called Attorney Riley who referred (sic) me to LaCross Law firm. LaCross reviewed my file and suggested I file an appeal with WERC.

My local union representatives (sic) was aware that I could have filed an appeal with WERC, they were also aware of the time limits, they refused (sic) to assist me with any information to help me get my job back after working for Milwaukee County for over six-teen (sic) years.

I trust you will find the information required to continue with the appeal and if any more information is needed please feel free to contact me

Sincerely,
Dewitt Webster

Having reviewed this response and all other matters filed by Webster, I conclude that the last date identified when either the Union or the County took action is March 2007 when Webster asserts the International Union advised him that it would not be overruling the Local

Union's decision not to file a grievance as to his discharge. Because March 2007 is more than one year before Webster filed the complaint on July 23, 2008, I conclude the complaint is not timely and must be dismissed.² Webster's efforts to get the local union to provide more information as to why they would not arbitrate his grievance and to determine where to file a complaint do not expand the time frame within which a timely complaint could be filed.

Dated at Madison, Wisconsin, this 30th day of November, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

² Both the Union and the County ask that they be awarded costs for defending what they view as a "frivolous" complaint. Sec. 227.483, Stats. allows costs to be awarded if the examiner finds either:

- (a) That the petition, claim, or defense was commenced, used or continued in bad faith, solely for the purposes of harassing or maliciously injuring another.
- (b) That the person or the party's attorney knew, or should have known, that the petition, claim or defense was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification, or reversal of existing law.

I do not find either (a) or (b) present here and thus deny the requests of costs.