

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PHILIP E. KLEIN, Complainant,

vs.

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT, Respondent.

Case 797
No. 67867
PP(S)-390

Decision No. 32574-A

Appearances:

Philip Klein, IS Business Automation Specialist, Wisconsin Department of Workforce Development, 201 East Washington Avenue, Room H103, P.O. Box 8916, Madison, Wisconsin 53708-8916, appearing on his own behalf.

David Vergeront, Chief Legal Counsel, Office of State Employment Relations, 101 East Wilson Street, 4th Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, appearing on behalf of the Respondent.

**FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

On March 21, 2008, Philip E. Klein filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission against his employer, the Wisconsin Department of Workforce Development. The allegations contained in the complaint will be identified in detail below. The complaint alleged that by its actions, the Respondent had violated Sections 111.82 and 111.84, Stats., ER 46.06, 46.09 and 46.10; and DWD Policy 411. On May 7, 2008, the State filed a motion to dismiss the complaint "on the ground that the WERC lacks jurisdiction of the allegations of the complaint." The Complainant filed a response to the Respondent's motion on July 2, 2008. The State filed another response on July 9, 2008 and the Complainant filed another response on August 7, 2008. On October 2, 2008, the Commission formally appointed Raleigh Jones to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. No evidentiary hearing has yet been conducted in this matter. Having considered the pleadings, as well as the

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arguments of the parties, I am satisfied that the Respondent's Motion to Dismiss should be granted. Accordingly, I hereby make and issue the following Findings of Fact, Conclusion of Law and Order Granting Respondent's Motion to Dismiss.

FINDINGS OF FACT

Since no evidentiary hearing has been conducted in this matter, the following undisputed facts are taken from the complaint and the documents submitted by the Respondent:

1. Complainant Philip E. Klein is a state employee who works for the Department of Workforce Development (DWD). He is in the statewide bargaining unit represented by the Wisconsin Professional Employees Council, AFT Wisconsin. He is a member of that union's bargaining team and is also a union steward.

2 Respondent Department of Workforce Development is a department of the State of Wisconsin. When unfair labor practice complaints are brought against state agencies, the Office of State Employment Relations (OSER), defends the agency. Thus, in this case, OSER is defending DWD against the unfair labor practice charge brought by Klein.

Chapter ER 46 of the Wisconsin Administrative Code is the formal grievance procedure for state employees not covered by a collective bargaining agreement. Section 46.06 therein is entitled "Procedures and time limits." Section 46.09 therein is entitled "Grievant representation." Section 46.10 therein is entitled "Retaliation prohibited."

In addition to the grievance procedure just referenced, the Department of Workforce Development also has a grievance procedure for non-represented employees. The Department's grievance procedure, which is found in DWD Section 411, incorporates Ch. ER 46 into it. In the section entitled "Eligibility", it provides that "This policy and procedure applies to all non-represented DWD employees in the classified service." In the section entitled "Pay Status for Grievants and Representatives", the first sentence provides that an employee can be assisted "by a representative of his or her own choice during the grievance procedure." The second sentence in that section provides that "The employee and representative, if a state employee, shall be allowed a reasonable period of time during normal work hours without loss of pay to investigate, prepare and present the grievance upon reasonable notice."

The Respondent's policy for disability accommodations is identified in DWD Section 418. Among other things, it contains the process for appealing the Employer's disability accommodation decisions.

3. Judith Morse is an Administrative Policy Advisor in the Department of Workforce Development (DWD). She is a non-represented, permanent and classified employee. She is exempt from being a represented employee because she is Management as defined in SELRA. At all relevant times herein, DWD was providing Morse with accommodations for what Morse described as "various permanent impairments."

4. On December 10, 2007, Morse was directed by her supervisor to provide medical documentation to support her disability accommodation(s).

5 In response to that directive, Morse filed a non-represented grievance on December 14, 2007. This grievance was filed in accordance with the Department's grievance procedure for non-represented employees. The grievance stated thus:

On December 10, 2007, my supervisor, Rebecca Swartz, threatened to revoke my current long-standing approved ADA accommodations for various permanent impairments, which include allowing me to work from home and some flexibility in work schedule along with many other accommodations. Other employees are allowed to work at home and have some flexibility in their work schedules even without an accommodation. This is unequal treatment and is a violation of the ADA.

The remedy which Morse sought was to "prohibit the removal of any accommodations that are related to permanent impairments." In that grievance, Morse identified Philip Klein as her personal representative in this matter. Since other grievances are going to be referenced in the facts which follow, the grievance just noted is identified as Grievance 1.

On January 11, 2008, the Employer denied the grievance just referenced. The Employer's response stated thus:

There is no record of an approved Disability Accommodation Request specific to Ms. Morse working at home or flexing her work schedule. In addition, this is not a grievable issue. DWD Policy #418 outlines the process for appealing disability accommodation decisions.

This grievance was not appealed to the second step of the non-represented employee grievance procedure.

6. After Grievance 1 was filed, Morse and Klein asked management to let them review Morse's medical records on state time. They asked for 20 to 30 hours to do that. Their requests for that amount of paid state time to review Morse's medical records was denied. Instead, each was granted one hour for that purpose.

7. In response to that action, Morse filed another grievance on January 10, 2008. This grievance is identified as Grievance 2. This grievance stated thus:

Ms. Morse is a non-represented employee who filed a grievance related to a disability accommodation denial/revocation. As part of that grievance it is necessary to review medical information with her representative. Necessary time for such grievances is allowed on work time, as specified in DWD Policy 411 for non-represented employees. "Each employee may have

assistance by a representative of his or her own choice during the grievance procedure, including during informal resolution efforts.” And, “The employee and representative, if a state employee, shall be allowed a reasonable period of time during normal work hours without loss of pay to investigate, prepare and present the grievance upon reasonable notice.” This time “to investigate, prepare and present the grievance upon reasonable notice” was denied by W-2 Policy Section Chief, Rebecca Swartz on January 9, 2008.

The remedy which Morse sought was “Approval of necessary work time to review medical information with the grievant’s representative to adequately prepare for the non-represented employee’s grievance.”

On January 15, 2008, the Employer denied this grievance. The Employer’s response stated thus:

Grievance returned. This is a non-grievable issue. DWD Policy #418 outlines the process for appealing disability accommodation decisions.

This grievance was not appealed to the second step of the non-represented employee grievance procedure.

8. On the same day that Morse filed Grievance 2 (i.e. January 10, 2008), Klein filed a grievance. This grievance was not filed under the contractual grievance procedure contained in the collective bargaining agreement between his union (WPEC) and the State. Instead, this grievance was filed under the Department’s grievance procedure for non-represented employees. As previously noted, Klein is a represented employee. Klein’s grievance, which is hereinafter identified as Grievance 3, stated thus:

Mr. Klein is a representative of Jude Morse, a non-represented employee who filed a grievance related to a disability accommodation denial/revocation. As part of that grievance it is necessary to review medical information with the grievant. Necessary time for such grievances is allowed on work time, as specified in DWD Policy 411 for non-represented employees. “Each employee may have assistance by a representative of his or her own choice during the grievance procedure, including during informal resolution efforts.” And, “The employee and representative, if a state employee, shall be allowed a reasonable period of time during normal work hours without loss of pay to investigate, prepare and present the grievance upon reasonable notice.” This time “to investigate, prepare and present the grievance upon reasonable notice” was denied by the Bureau Director, Nancy Buckwalter on January 9, 2008.

The remedy which Klein sought was “Approval of necessary work time to review medical information with the grievant to adequately prepare for the non-represented employee’s grievance.” In that grievance, Klein identified John Verberkmoes as his personal representative in this matter.

On January 30, 2008, the Employer denied this grievance. The Employer's response stated thus:

Grievance return. (sic) As a represented employee, Phil Klein has no standing to file a non-represented grievance.

Klein appealed this grievance to the second step of the non-represented employee procedure. His appeal at this step stated thus:

Ms. Morse is a non-represented employee who filed a grievance related to unequal treatment and illegal accommodation denials and gave reasonable notice for reasonable time to investigate, prepare and present that grievance. Mr. Klein is her personal representative. Adequate time was denied. This was grieved on 1/10/08 and that grievance was "returned" on 1/30/08 because it was claimed that "As a represented employee, Phil Klein has no standing to file a non-represented grievance." However, Mr. Klein is representing a non-represented employee, not a WPEC member, and as such he should be afforded the full rights of any personal representative. Policy 411 is intended to assure representation by a person of the complainant's choice and to make sure adequate time is provided to both the complainant and the representative for investigation, preparation and presentation of the grievance, even if you believe the grievance does not have merit.

The remedy which Klein sought was "Deal appropriately with the previously 'returned' Step 1 grievance related to providing appropriate time to investigate, prepare and present the current grievance for this representative."

The Employer denied the appeal. The Employer's response stated thus:

Met with Mr. Klein and Mr. Verberkmoes 2/7/08, but did not hear grievance. As a represented employee, Mr. Klein has no standing to file a non-represented grievance. Grievance returned this date.

Klein appealed this grievance to the third step of the non-represented employee grievance procedure. His appeal at this step stated thus:

Denial to hear Step 2 grievances by James Bond on 2/7/08 that were based on a lack of standing for a represented person who is a personal representative in a non-represented case is inappropriate and violates administrative rules and established DWD policies.

This also effectively denies the right of the represented person to be a fully protected personal representative of a non-represent employee, which DWD and other agency HR staff has asked of our Union on numerous occasions.

Additionally, the non-represented employee effectively loses any representation while this process goes on, clearly violating DWD's own policies.

The Employer denied the appeal. The Employer's response stated thus:

Grievance returned. WPEC member Phil Klein has no standing to file a non-represented employee grievance. DWD Policy #418 provides the process for the non-represented employee to appeal disability accommodation decisions.

Represented employees are protected by their respective collective bargaining agreements. In the future, non-represented employee grievances filed by represented employees will be returned without action.

9. On February 14, 2008, Morse filed another grievance, contending she was denied a reasonable amount of time to review her medical files with her personal representative. This grievance is hereinafter identified as Grievance 4. This grievance stated thus:

On January 24, 2008, James Bond denied Jude Morse a reasonable amount time with her personal representative to investigate, prepare and present a grievance on work time without loss of pay. This is contrary to Policy 411 and other state laws and rules.

The remedy which Morse sought was "Provide a reasonable amount time with her personal representative to investigate, prepare and present a grievance on work time without loss of pay. This includes any necessary corrections to the relevant medical/disability files."

The Employer denied the appeal. The Employer's response stated thus:

Grievance returned. This is a non-grievable issue. DWD Policy #418 outlines the process for appealing disability accommodation decisions.

Morse appealed this grievance to the second step of the non-represented employee grievance procedure. At this step, Morse added a new allegation, namely that she had been given a copy of her medical file which was incomplete and inaccurate and that had been made available to unauthorized personnel. Additionally, at this step, she changed her representative from Klein to Ron Blascoe. Her appeal at this step stated thus:

On January 24, 2008, James Bond denied Jude Morse and her representative a reasonable amount of time to investigate, prepare and present a grievance on work time without loss of pay, contrary to Policy 411. On January 31, 2008, the grievant received a copy of her medical file. It contained incomplete and inaccurate information. In addition, it appears that the file had been made available to unauthorized personnel.

The remedy which Morse sought was “That the grievant be made whole and that she and her representative be granted a reasonable amount of time to investigate, prepare and present a grievance on work time without loss of pay. In addition, that the medical file be corrected and that, in the future, it be made available only to authorized personnel.”

The Employer denied the appeal. The Employer’s response stated thus:

Met with Ms. Morse and her current representative Ron Blascoe on Monday, March 10, 2008, to hear this grievance. Ms. Morse’s initial grievance alleged “unequal treatment and illegal accommodation denials/revocation” by management. Ms. Morse and her representative were informed in writing, that DWD Policy #418 outlines the process for appealing disability accommodation decisions, not the grievance process. Management’s position remains the same. Thus this grievance is being returned.

Morse appealed this grievance to the third step of the non-represented employee grievance procedure. Her appeal at this step stated thus:

On January 24, 2008, James Bond denied Jude Morse and her representative a reasonable amount of time to investigate, prepare and present a grievance on work time without loss of pay, contrary to Policy 411. On January 31, 2008, the grievant received a copy of her medical file. It contained incomplete and inaccurate information.

The remedy which she sought was “That the grievant be made whole and that she and her representative be granted a reasonable amount of time to investigate, prepare and present a grievance on work time without loss of pay. In addition, that the medical file be corrected.”

The Employer denied the appeal. The Employer’s response stated thus:

Grievance returned. Non-grievable issue. DWD Policy #418 outlines the process for appealing disability accommodation decisions.

10. On March 21, 2008, Klein filed an unfair labor practice complaint against DWD which challenged the actions noted above. In the complaint, Klein alleged that Respondent’s actions violated Secs. 111.82 and 111.84 of SELRA, ER 46.06, 46.09 and 46.10 of the Wisconsin Administrative Code, and DWD Policy 411.

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

CONCLUSION OF LAW

The allegations contained in the complaint do not constitute unfair labor practices within the meaning of Sec. 111.84, Stats.

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

ORDER

The Respondent's Motion to Dismiss is granted. The complaint is hereby dismissed.

Dated at Madison, Wisconsin, this 16th day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

WISCONSIN DEPARTMENT OF WORKFORCE DEVELOPMENT (Philip E. Klein)

**MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW
AND ORDER GRANTING RESPONDENT'S MOTION TO DISMISS**

As noted in this decision's prefatory paragraph, the Respondent has filed a Motion to Dismiss the complaint. The Respondent argues that the Commission lacks jurisdiction over this matter and/or that the Complainant has failed to state a claim on which relief can be granted. The Complainant opposes the Respondent's motion.

A. The Pleadings

The underlying factual basis for all of the issues raised in this complaint is Morse's efforts to maintain her ADA accommodations. The Complainant's claims relate to his filing of a non-represented grievance pertaining to that underlying matter. In Par. C, 1, he alleges that he and Morse were not allowed to review Morse's medical files during work time, and that this was a "unilateral decision which was inappropriate." In Par. C, 5, he claims that the answer given by the Employer to his grievance at Step 2 was non-responsive, violated Policy 411, and was an unfair labor practice. In that same paragraph, he also contends that since his grievance "had its root in a non-represented grievance" [referring to Morse's first grievance] "the personal representative should be accorded non-representative status for all matters related to that grievance. To not even hear that argument is an unfair labor practice." In Par. C, 6, he claims that the answer given by the Employer to his grievance at Step 3 was also an unfair labor practice and "indicates union animus". In Par. C, 7, he claims that providing he and Morse with copies of Morse's medical records, with the instruction to review them during non-work hours is also an unfair labor practice and "smacks of union animus." The complaint alleges that by these actions, the Respondent violated Secs. 111.82 and 84; ER 46.06, 46.09 and 46.10; and DWD Policy 411.

B. The Legal Standards Applicable To a Motion to Dismiss

The Respondent's Motion to Dismiss is governed by Chapters 227 and 111 of the Wisconsin Statutes. Chapter 227 establishes the general framework for administrative agency proceedings. Chapter 111.84 provides the basis for the unfair labor practices alleged and Sec. 111.07 creates the procedure by which those allegations are addressed.

The Commission is an "Agency" under Sec. 227.01(1), Stats. and sub-section (3) defines a contested case as "an agency proceeding in which the assertion of 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." In this case, the Complainant asserts that he has been denied the right to serve as a personal representative in another state employee's grievance, pursuant to ER 46, Wis. Adm. Code. This case is a contested case within the meaning of subsection (3).

Dismissing a contested case prior to hearing is an uncommon result. When it does occur, it is usually because there is a lack of jurisdiction, a lack of timeliness or the complaint fails to state a claim. See COUNTY OF WAUKESHA, DEC. NO. 24110-A (Honeyman, 10/87), aff'd DEC. NO. 24110-B (WERC, 3/88); MORAINÉ PARK TECHNICAL COLLEGE ET AL., DEC. NO. 25747-C (McLaughlin, 9/89), aff'd DEC. NO. 25747-D (WERC, 1/90); CITY OF MILWAUKEE (POLICE), DEC. NO. 29485-A (Jones, 2/99); and CITY OF MADISON (TRANSIT), DEC. NO. 30288-A (Jones, 3/02), aff'd DEC. NO. 30288-B (WERC, 1/03). Thus, an examiner can dismiss a complaint for the foregoing reasons.

When ruling on pre-hearing motions to dismiss, Commission examiners have long cited the following standard:

Because the dramatic 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. UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN, DEC. NO. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 27982-B (WERC, 6/94).

That standard will be applied here as well.

C. The Facts

The undisputed facts are summarized as follows.

Klein is a represented employee. Additionally, he is a member of his union's bargaining team and is a union steward. He avers in his reply brief that his "professional expertise representing state employees in a variety of circumstances is well known." Morse is a non-represented employee. Morse decided to file a grievance to maintain what she described as her "long standing approved ADA accommodation for various permanent impairments." She selected Klein to be her personal representative in this grievance. She could do that because the non-represented grievance procedure provides that an employee can be represented by a representative of his/her choosing. Thus, Klein could represent Morse in her grievance. Klein also avers in his reply brief that his motive in representing Morse stems "from his desire to represent a harmed fellow employee" and "his desire to right a wrong."

The grievance which Morse filed was previously identified as Grievance 1. When the Employer responded to it, it maintained that the matter was not a grievable issue, and should instead be addressed in accordance with DWD Policy 418, which contains the process for appealing disability accommodation decisions. This grievance was not appealed to the second step of the non-represented employee grievance procedure.

While that grievance was being processed, both Morse and Klein requested paid work time to prepare the grievance, in accordance with ER 46.09 Wis. Adm. Code. Neither was granted the full amount of time sought. They both grieved that action.

Morse's grievance was previously identified as Grievance 2. In that grievance, she alleged that she and her personal representative (Klein) had been denied the opportunity to appropriately prepare her underlying grievance. When the Employer responded to this grievance, it maintained this was "a non-grievable issue" and averred – just as it did when it responded to Grievance 1 – that "DWD Policy 418 outlines the process for appealing disability accommodation decisions." This grievance was not appealed to the second step of the non-represented employee grievance procedure.

Klein's grievance was previously identified as Grievance 3. In this grievance, Klein alleged that as Morse's personal representative on her grievance, he had not been allowed a reasonable amount of work time to investigate, prepare and present Morse's grievance. The Employer denied this grievance. When it did so, it maintained that since Klein was a represented employee, he had "no standing to file a non-represented grievance." Klein subsequently appealed his grievance to Step 2 and 3 of the non-represented employee grievance procedure. Each time, the Employer's response was the same: to wit, that as a represented employee, he had "no standing to file a non-represented employee grievance." Thus, the Employer did not address Klein's grievance on the merits at Step 1, 2 or 3.

Morse later filed another grievance, which was previously identified as Grievance 4. In that grievance, she alleged that she had been denied "a reasonable amount of time with her personal representative to investigate, prepare and present a grievance on work time. . ." The Employer denied this grievance. When it did so, it maintained that this was "a non-grievable issue", and averred – just as it did in response to Grievance 1 – that "DWD Policy 418 outlines the process for appealing disability accommodation decisions." Morse subsequently appealed this grievance to Step 2 and 3 of the non-represented employee grievance procedure. Each time, the Employer's response was the same: to wit, that "DWD Policy 418 outlines the process for appealing disability accommodation decisions." Thus, the Employer did not address Grievance 4 on the merits at Step 1, 2 or 3.

D. Application of the Law to the Facts

As previously noted, the complaint alleges that the Respondent violated Secs. 111.82 and 111.84; ER 46.06, 46.09 and 46.10; and DWD Policy 411 by its actions herein. The alleged SELRA violations will be addressed first.

Alleged Violations of Secs. 111.82 and 111.84

Section 111.82 is entitled "Rights of Employees." As the title indicates, it grants certain rights to state employees. Specifically, it grants them: 1) the right to self-organization; 2) the right to form, join or assist labor organizations; 3) the right to bargain collectively

through their representatives; 4) the right to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection; and 5) the right to refrain from any or all of these activities. When the word “employee” is used in that subsection, it excludes non-represented employees. The phrase “mutual aid or protection”, which is also used in that section, references mutuality. That term (mutuality) essentially refers to a community of interest between employees. SELRA reflects the difference in community of interests between represented and non-represented by excluding the non-represented employees from its coverage. Those employees who are excluded from SELRA’s coverage do not share the same community of interests with represented employees. Thus, represented employees have different rights and entitlements that are protected by SELRA while non-represented employees do not enjoy those rights or entitlements.

The parties disagree over whether Klein (a represented employee) and Morse (a non-represented employee) can engage in concerted activity for “mutual aid or protection” within the meaning of Sec. 111.82. According to the Respondent, Klein and Morse are not legally capable of engaging in concerted activity for “mutual aid or protection” because a represented employee cannot (ever) provide “mutual aid or protection” to a non-represented employee under Sec. 111.82. Klein disagrees with that interpretation. Notwithstanding their disagreement, the Examiner finds it unnecessary to answer that question because a decision on the motion can be made by reviewing Sec. 111.84 and applying it to the facts. The focus now turns to that.

The rights identified in Sec. 111.82 are enforced via Sec. 111.84. That section enumerates the various unfair labor practices which an employer can commit. Usually when a complainant files a complaint, they identify one or more of the six subsections contained therein and contend that the Respondent’s actions violated that subsection. Klein did not do that here. Since Klein did not specify which subsection the Respondent allegedly violated by its actions, I will apply all of them to the facts raised in the complaint. In the discussion which follows, I will address subsections (a) and (c) together. After that, I will address the remaining subsections.

Before I address the six subsections of Sec. 111.84 though, I’ve decided to note that those subsections are only going to be applied to Klein – not Morse. Here’s why. As previously noted, Morse is a non-represented employee and thus SELRA does not apply to her. Since she does not enjoy the rights specified in Sec. 111.82, any alleged adverse (employment) action against her could not be a violation of Sec. 111.84. This means that the Respondent’s only potential violations under Sec. 111.84 would have to be with respect to any alleged adverse action taken by Respondent against Klein for conduct in which he engaged which is protected under SELRA.

Next, I’ve decided to repeat the factual allegations which are going to be applied to Sec. 111.84. They are as follows: 1) that Klein was not being allowed to file a non-represented grievance; 2) that he did not receive a grievance response from the Employer which addressed the merits of his grievance; 3) that his grievance was denied; 4) that he was

not allowed to represent Morse; and 5) that he was not allowed reasonable period of time to review Morse's medical records on state time.

Subsection 1(a) makes it an unfair labor practice for the employer "to interfere with, restrain or coerce employees in the exercise of their rights guaranteed in Sec. 111.82" and Subsection 1(c) makes it an unfair labor practice for the employer to "encourage or discourage membership in any labor organization by discrimination in regard to hiring, tenure or other terms or conditions of employment." 1(a) is commonly described as the interference claim and 1(c) is commonly described as the discrimination claim.

The Examiner finds that none of the previously-identified factual allegations present either a viable interference claim under 1(a) or a viable discrimination claim under 1(c). Here's why. While three of the grievances referenced in the complaint were filed by Morse, Klein also filed a grievance on his own. When he did so, Klein did not file his grievance in his capacity as a represented employee. He acknowledged that in his initial brief when, in reference to the filing of that grievance, he stated: "I was not acting in my capacity as a represented employee. . . ." By filing his grievance under the Department's non-represented grievance procedure, he tried to enter the arena of the non-represented. Klein averred that by filing a non-represented grievance, his status as a represented employee did not carry over into that realm because his grievance "had its roots in a non-represented grievance" [referring to Morse's first grievance]. After Klein filed his grievance, it was processed through the third step of that grievance procedure and denied at each step. While Klein objects to the fact that his grievance was denied, it is not a 1(a) violation for the Employer to deny a grievance. Additionally, Klein objects to the fact that the Employer did not address the merits of his grievance, but instead simply averred each time that he had no standing to file a non-represented grievance. According to Klein, the Employer's response was non-responsive and an unfair labor practice. Notwithstanding his objection though, the Employer could do that (i.e. respond in that fashion when answering the grievance) because both ER 46 of the Wis. Adm. Code and DWD Policy 411 apply exclusively to non-represented employees (meaning they are available to only non-represented employees). Thus, a represented employee cannot file a grievance under either of the foregoing authorities. Since that is what happened here (i.e. represented employee Klein filed a grievance under the non-represented procedure), his grievance was null and the Employer did not have to hear or discuss the merits of Klein's grievance with him. The Employer's response to Klein's grievance (i.e. that as a represented employee, he had no standing to file a non-represented grievance) simply stated a valid legal conclusion and recited what those authorities (i.e. Ch. 46 and DWD Policy 411) specified. With regard to the claim that Klein was not allowed to represent Morse, the undisputed facts show that Klein was allowed to, and in fact did, represent Morse in her various grievances. Consequently, there can be no violation of 1(a) under the circumstances because the acts complained of (i.e. the denial of his grievance, the Employer's refusal to hear his grievance on the merits, and the denial of state time to review Morse's medical records) do not involve SELRA-protected rights. As will be noted in more detail below, the rights Klein was attempting to exercise involve Ch. 46 and DWD Policy 411. Nor can there be a violation of 1(c) under the circumstances. Klein's claim of animus, hostility and/or retaliation is based, as

already noted, on the Employer's denial of his grievance, the Employer's refusal to hear his grievance on the merits, and the denial of state time to review Morse's medical records. The Employer had a lawful right to take those positions though, so the Employer's exercise of that right cannot be a violation of 1(c).

The focus now turns to the remaining subsections in Sec. 111.84.

Subsection 1(b) makes it an unfair labor practice for an employer "to initiate, create, dominate or interfere with the formation or administration of any labor organization." Giving the Complainant the benefit of the doubt, there are no factual allegations in the complaint which reference any of the foregoing, or would support a claim that the Employer's actions herein threatened the independence of a labor organization as a representative of employee interests.

Subsection 1(d) makes it an unfair labor practice for an employer to refuse to bargain collectively over matters set forth in Sec. 111.91 with a representative of a majority of its employees. A review of Sec. 111.91 reveals that DWD Policy 411 and Ch. ER 46 of the Wis. Adm. Code are not subjects of bargaining for represented employees. That being so, the Employer did not have to bargain with Klein about those matters. As a result, there are no facts alleged herein which would constitute a violation of 1(d).

Subsection 1(e) makes it an unfair labor practice for an employer to violate a collective bargaining agreement previously agreed upon. In this instance, Morse is not covered by any collective bargaining agreement, so there is no contract that applies to her grievance. While there is a collective bargaining agreement that applies to Klein (i.e. the one between the State and WPEC), Klein does not allege that the contract was violated, and the grievance which he filed (i.e. the one identified as Grievance 3) was not filed under that contract's grievance procedure. Additionally, there is no arbitration award involved for which there is a claim that Respondent has failed to follow. As a result, there can be no violation of Subsection 1(e) under the circumstances.

Finally, Subsection 1(f) makes it an unfair labor practice for an employer to improperly deduct (union) dues. In this case, there are no allegations in the complaint which raise such a claim, so there are no facts raised in the complaint which could be deemed or construed to constitute a violation of Subsection 1(f).

Based on the above, the Examiner concludes that the facts alleged do not state a claim under any of the six subsections of Sec. 111.84.

Alleged Violations of Ch. 46 and DWD Policy 411

The complaint also alleges that the Employer violated Ch. 46 and DWD Policy 411 by its actions here. Those authorities govern non-represented employees. Any rights which Klein had to represent Morse in a non-represented grievance or to review any of Morse's medical

records on state time in preparation for a non-represented grievance hearing would have its origin in, or were founded in, those authorities. Thus, those authorities – not SELRA – provide answers to the following questions/issues raised by the Complainant: what are his rights under the non-represented grievance format (Policy 411); was what DWD did in terms of preparation time and providing copies of the medical records appropriate under Policy 411; were the denials at the various steps of the grievance procedure appropriate; and does Policy 411 or Policy 418 control here?

The WERC has two types of jurisdiction that conceivably relate to the claims raised in this complaint: one is to entertain unfair labor practices filed under Sec. 111.84 of SELRA and the other is to entertain arbitrations of certain types of grievances filed under Sec. 230.45(1)(c). As already noted, the employees covered by the former (i.e. SELRA) are represented employees while the employees covered by the latter (i.e. Sec. 230.45(1)(c)) are non-represented employees. The jurisdiction bestowed by Sec. 230.45(1)(c) came to the WERC when the Personnel Commission was abolished. Section 230.45(1)(c) allows a non-represented employee to appeal certain grievances to the WERC which acts as an arbitrator in resolving the dispute. The types of grievances that can be appealed to the WERC are identified in ch. ER 46, Wis. Adm. Code.

The type of jurisdiction which a complaint seeks to invoke is important. If it's a SELRA case, then there are certain standards and procedures which apply. However, if the jurisdiction is pursuant to Sec. 230.45(1)(c), then there are different standards and procedures which apply.

The issues which the Complainant raised about his non-represented grievance are typically resolved under Sec. 230.45(1)(c) – not SELRA. When the Complainant filed his complaint though, he did not allege a violation of Sec. 230.45(1)(c). Instead, the only statute he referenced was SELRA (specifically, Secs. 111.82 and 111.84). That's important because it made this case a SELRA case. However, on its face, SELRA does not cover Ch. 46 or DWD Policy 411, so alleged violations of the latter authorities cannot constitute unfair labor practices within the meaning of SELRA. While there may be circumstances where the WERC would interpret and apply Ch. 46 and DWD Policy 411, the question here is not whether the WERC can ever resolve disputes involving those authorities. Instead, it's whether the WERC has jurisdiction to resolve disputes involving Ch. 46 and DWD Policy 411 which have been bootstrapped as alleged unfair labor practices into a SELRA case. The Examiner answers that question in the negative, meaning that the WERC does not have jurisdiction to resolve disputes involving Ch. 46 and DWD Policy 411 in this SELRA case. The Examiner cannot simply switch this case from a SELRA case to one under Sec. 230.45(1)(c) on his own volition. In order for that to happen, a different complaint needs to be filed. Additionally, the Examiner cannot simply address the claimed violations of Ch. 46 and DWD Policy 411 independent of SELRA. I need a jurisdictional basis to do that, and it is lacking herein.

In sum then, the Examiner has found that the allegations contained in the complaint do not constitute unfair labor practices within the meaning of SELRA. While the allegations

contained in the complaint may constitute violations of other authorities – namely, Ch. 46 and DWD Policy 411 – the WERC does not have jurisdiction to address those claims in this particular case because this case was filed as a SELRA case. Accordingly, the Respondent's Motion to Dismiss has been granted, and the complaint is dismissed.

Dated at Madison, Wisconsin, this 16th day of October, 2008.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

