

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

CHRIS M. JANESKY, Complainant,

vs.

GREEN BAY AREA PUBLIC SCHOOL DISTRICT and **JOHN J. WILSON**, and the
GREEN BAY SUBSTITUTE TEACHER'S ASSOCIATION, Respondents.

Case 241
No. 68310
MP-4457

Decision No. 32602-A

Appearances:

Chris M. Janesky, 317 Cleveland Avenue, Manitowoc, Wisconsin 54220, appearing pro se.

Attorney Robert W. Burns, 318 South Washington Street, Green Bay, Wisconsin 54301, appearing on behalf of the Respondents.

FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

On October 1, 2008, Chris M. Janesky filed a complaint with the Wisconsin Employment relations Commission (WERC) alleging that the Green Bay Area Public School District (District) had committed prohibited practices within the meaning of Sec. 111.70(3)(a) 5 and Sec. 111.70(3)(b)1 of the Municipal Employment Relations Act (MERA) by failing to employ him as a substitute teacher during the school year 2007 - 2008.

On November 5, 2008 the Respondent District filed a Motion to Dismiss based on the assertion, *inter alia* that the complaint was filed more than one year following the events giving rise thereto and asserting a lack of jurisdiction on the part of the WERC.

On November 6, 2008, the Examiner held an initial conference call with the parties at which time the provision for hearing within 40 days of the date of filing of the complaint was waived by both parties. The Examiner offered Complainant an opportunity to respond in writing to the District's Motion to Dismiss by December 6, 2008, stating reasons why the

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complaint should not be dismissed. The hearing initially scheduled for November 12, 2008, was cancelled and further scheduling efforts were held in abeyance pending the foregoing. The Examiner communicated the results of the agreements made during this conference call by letter to the parties dated November 6, 2008.

On December 11, 2008 the Examiner scheduled another conference call with the parties in order to inquire as to why the Complainant had failed to respond to the District's Motion to Dismiss by December 6, 2008 as agreed in the parties' October 6, 2008 conference. The Examiner agreed, over the District's objection, to allow the Complainant until January 4, 2009 to file any response to the District's Motion to Dismiss. The Examiner informed the Complainant that no further delays or extensions of time would be granted; that there were no hearings or other proceedings currently scheduled; and that he was free to engage legal counsel if he desired to do so. The agreements regarding the above were communicated to the parties by the Examiner in his letter dated December 11, 2008.

On January 5, 2009 the Complainant filed his response to the district's Motion to Dismiss and on January 30, 2009 the Respondent filed its response re-asserting it's Motion to Dismiss on the basis of lack of jurisdiction of the Commission consistent with Sec. 111.07(14), Stats.

On February 6, 2009, the Examiner held a conference call with the parties. As a result of that conference call the District's Motion to Dismiss was held in abeyance pending hearing; the Complainant was given until March 15, 2009 to make any amendments to the existing Complaint (During the conference call on February 6, 2009, it became clear to the Examiner that the Complainant's intent in bringing the Complaint was to include an allegation against the Green Bay Substitute Teachers Association (hereinafter Union) of violating Sec. 111.70(3)(b) 1, Stats.); and that the parties would schedule a date for hearing in the near future after the parties had provided the Examiner with potential dates during the month of April, 2009. The agreements made during this conference call were communicated to the parties by the Examiner's letter dated February 6, 2009.

On March 9, 2009, the Examiner received a letter from the Complainant indicating his desire to add the Union as a Respondent and to allege a violation of Sec. 111.70(3)(b)1, Stats. On April 6, 2009 the Examiner notified all parties by letter that he was treating the Complainant's letter of March 9, 2009 as a Motion to Amend his Complaint and that said Complaint was granted. The Examiner also advised the Complainant that he (the Examiner) had attempted on a number of occasions to contact him at the telephone number he (the Complainant) had supplied but the number seemed to be out of order.

On July 28, 2009, the Respondent District advised the Examiner that its Answer and Affirmative Defenses currently on file were re-asserted with respect to the Amended Complaint and that it also re-asserted its Motion to Dismiss, at which point the matter stood ready for a determination by the Examiner whether to dismiss the Complaint without a hearing or to proceed with a hearing in the matter. Because the issues surrounding the Complainant's

allegations that he had filed a grievance relating to the instant matter within the one year statute of limitations were sufficiently clouded and because the Complainant asserted that someone from the WERC had indicated to him that his Complaint was timely, the Examiner held the Motion to Dismiss in abeyance and determined to hold a hearing into the matter.

The matter was scheduled for hearing on August 19, 2009 and pursuant to notice the Examiner, having been duly appointed by the WERC to make and issue Findings of Fact, Conclusions of Law and Order, conducted a hearing on the matter on that date at the District offices in Green Bay, Wisconsin. A transcript of that hearing was provided to the Commission by September 3, 2009, and post hearing briefing was completed by October 19, 2009, whereupon the record was closed. Having considered the pleadings, the evidence and the arguments submitted by the parties in the light most favorable to Complainant, the Examiner finds it appropriate to issue the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. The Complainant is an individual residing at 317 Cleveland Avenue, Manitowoc, Wisconsin. At various times material herein, Complainant was a municipal employee employed by the District as a substitute teacher.

2. The Respondent District is a municipal employer with offices at 200 South Broadway, Green Bay, Wisconsin. At all material times, John J. Wilson was employed by the District as the Assistant Superintendent for Human Resources.

3. The Respondent Union is a labor organization with offices located at 2720 Dauber Drive, Green Bay, Wisconsin and at all material times Richard Schadewald was employed by the Union as its Staff Representative.

4. The District and the Union, and at various times the Complainant, have, at all times material, been parties to a collective bargaining agreement covering the substitute teachers. At all material times the Union has been the exclusive bargaining representative of the substitute teachers' bargaining unit .

5. During the school year 2004 - 2005 the Complainant worked as a substitute teacher employed by the District.

6. In June, 2005, the Complainant filed a claim for unemployment benefits during the summer between school years 2004 - 2005 and 2005 - 2006. The Department of Workforce Development, Division of Unemployment Insurance held a hearing on his claim and determined him to ineligible for benefits based upon its finding that he had a "reasonable assurance" of performing substitute teaching services "for an educational institution" in the 2005 - 2006 school year.

7. In April of each year the District sends each substitute teacher a letter asking if they intend to return to substitute teaching the following year. This letter was sent to the Complainant in April, 2005. The letter requires the substitute teacher to return a portion of the letter indicating his/her intent to return the following year. The Complainant failed to return his letter and was removed from the substitute teacher list pursuant to the District's policy.

8. The Complainant did not work for the District as a substitute teacher (or in any other capacity) during the school year 2005 - 2006.

9. The parties' collective bargaining agreement provides, in pertinent part under Article V - Working Conditions and Assignment:

...

C. 1. All newly-hired substitute teachers will serve a one-year probationary period during which time they may be dismissed for reasons not arbitrary or capricious

2. Substitute teachers who substitute less than ten (10) days per year will be removed from the active substitute teacher list.

Pursuant to the above paragraph C. 2. The Complainant was removed from the substitute teacher list following the 2005 - 2006 school year.

10. Due to an administrative error the Complainant worked for the District as a substitute teacher during the school year 2006 - 2007.

11. On April 30, 2007, John Wilson, on behalf of the District, notified the Complainant that the District had activated him improperly due to a clerical error when it offered him a substitute teaching job(s) during the school year 2006 - 2007. Wilson further notified the Complainant that he would be removed from the substitute teaching rolls and terminated effective May 1, 2007. The contents of Wilson's letter follows:

Chris Janesky
317 Cleveland Ave.
Manitowoc, WI 54220-2917

April 30, 2007

Re: Removal from Green Bay Substitute Teacher List

Dear Mr. Janesky:

It recently came to my attention that you were being offered and accepting sub teaching assignments with our district since October of 2006.

You had not worked for our district during the 2005-2006 school year. It appears that a clerical employee who has since left the employ of the district activated you improperly.

In that you were not interviewed by me nor recommended and approved for employment in the Fall of 2006, I am removing you from the sublist and terminating your employment with the Green Bay Area Public Schools, effective May 1, 2007.

Sincerely,

John J. Wilson
Assistant Superintendent-Human Resources

The Complainant was told by someone (the record is unclear as to whom, but infers that it was Wilson) that he could apply for employment on-line. He did so during the summer of 2007 and did not receive a reply.

12. At some time in November or December, 2007 (the record is unclear as to specific dates) the Complainant made contact by phone with the Union's representative, Richard Schadewald, and complained about the District's actions taken on May 1, 2007. At that time Schadewald looked into the matter and spoke with Wilson about it. The record reflects that Schadewald did not file a formal grievance on behalf of the Complainant because the Complainant was no longer a member of the Union and, because of that, the membership instructed him not to do so. He did, however, speak with Wilson on what the record reflects was an informal basis (Although Schadewald refers to his actions as "step one", Wilson testified credibly that no grievance had ever been filed or was currently being processed by the Union on Complainant's behalf.) about the matter sometime during the November - December, 2007 time frame. Following that meeting Schadewald and the Union determined not to go forward with a grievance on behalf of the Complainant. The record is unclear as to whether this determination was communicated to Complainant at this time.

13. The record does not reflect the nature or the extent of any conversations (if any) between the Union and the Complainant or between the District and the Complainant during the time period December, 2007 and April, 2008. On April 21, 2008, the Complainant sent the following letter to the District:

April 21, 2008

317 Cleveland Avenue
Manitowoc, WI 54220
920-684-5495

John Wilson
Human Resources
Green Bay Area School District
200 South Broadway
Green Bay, WI 54303

Mr. Wilson:

This is to notify that I am filing a grievance against the Green Bay Public School District as of this time. I worked as a substitute teacher last year and I expected to work again this year.

Hopefully, Level One of the grievance procedure will happen as soon as possible. Also, Levels Two; Three; and Four, if necessary.

Thank you,

Chris Janesky

14. The parties' collective bargaining agreement provides, in pertinent part, under Article IV - Grievance Procedure:

...

C. Initiating and Processing

...

2. Level Two.

a. If the Grievant is not satisfied with the disposition of his grievance at Level One, he may file the grievance in writing to the Association within five (5) days after the decision at Level One, or fifteen (15) days after the grievance was presented, whichever is sooner. Within five (5) days after receiving the written grievance, the Association representative will refer it to the Superintendent.

...

- c. If the written grievance is not forwarded to the Superintendent within sixty (60) days after the facts upon which the grievance is based became known, or the act or condition on which the grievance is based occurred, then the grievance will be considered as waived. A dispute as to whether a grievance has been waived under this paragraph will be subject to arbitration pursuant to Level Four.

15. On April 30, 2008, Wilson responded to the Complainant as follows:

Dear Mr. Janesky:

I have received your letter dated April 21, 2008 referencing that you are filing a grievance. You do not state a reason for the grievance.

I have contacted the representative of the Green Bay Area Substitute Teachers Association (GBSTA), the exclusive bargaining agent for Substitute Teachers in this district, regarding your grievance. Mr. Schadewald, the GBSTA representative informed me that they are not processing any grievance on your behalf.

As an individual and also as a non-employee you have no status to file a grievance.

Sincerely,

John J. Wilson
Assistant Superintendent-Human Resources.

16. The record does not to reflect any further activity or communication to the District from the Complainant or from the District to the Complainant regarding the "grievance" or its status until October 1, 2008, at which time the Complainant filed the instant complaint with the WERC alleging that the Respondents Green Bay Area Public School District and John J. Wilson committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 111.70(3)(b)1, Stats.

17. Following various communications among the parties and the Examiner, Complainant amended his complaint on April 6, 2009 adding as an additional Respondent the Green Bay Area Substitute Teacher's Association alleging a failure of its duty to fairly represent him under Sec. 111.70(3)(b)1.

18. The complaint and the amended complaint do not specifically state the nature of the order sought. Inferentially, the Examiner concludes that the Complainant seeks an order restoring the Complainant to employment with the Green Bay Area Public School District as a substitute teacher and a determination as to why he was not re-hired by the District following May 1, 2007.

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

CONCLUSIONS OF LAW

1. The Respondent District is a “municipal employer” within the meaning of Section 111.70(1)(j), Stats.

2. John J. Wilson was at all times an agent of the Respondent District and acted within the scope of his authority as an agent of the Respondent District.

3. Richard Schadewald was at all times an agent of the Respondent Union and acted within the scope of his authority as an agent of the Respondent Union.

4. Complainant did not file a timely grievance with the Union in November or December, 2007, nor did his letter to the District on April 21, 2008 constitute a timely filed grievance.

5. The Complainant’s untimely attempts to file a grievance as set forth in Conclusion of Law 4 were insufficient to toll the statute of limitations set forth in Sec. 111.07 (14), Stats. made applicable to these proceedings by Sec. 111.70(4)(a), Stats.

6. The instant complaint was filed with the WERC more than one year after the specific acts or prohibited practices alleged in the Complaint, as amended.

7. Section 111.70(4)(a), Stats. establishes a one year time limit for filing prohibited practice complaints against Municipal Employers and Labor Organizations. Because the instant complaint, as amended, was initiated in excess of one year after the date of the specific acts or prohibited practices alleged in the Complaint, as amended, the instant Complaint, as amended, is time barred by Sec. 111.70(4)(a), Stats.

ORDER

The instant complaint, as amended, is hereby dismissed as to all Respondents.

Dated at Wausau, Wisconsin, this 8th day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

Steve Morrison, Examiner

GREEN BAY AREA PUBLIC SCHOOL DISTRICT and JOHN J. WILSON (Janesky)

**MEMORANDUM ACCOMPANYING EXAMINER'S
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

The hearing in this matter failed to evince any further clarification on the issues relating to the District's Motion to Dismiss this Complaint on the basis of timeliness. In effect, the hearing evolved into what became primarily a hearing on the District's Motion to Dismiss.

Complainant's Position

The Complainant's post hearing brief, received by the Commission on October 5, 2009, is set forth below in its entirety:

I have been employed as a substitute teacher with the Green Bay Public School District from 1999 thru 2007. I did not work for the district during the 2005-2006 school years. I do not know why (not). In June, 2005, I filed for unemployment compensation for the summer of 2005. My claim was denied because it was determined that I have a reasonable assurance of work in the same capacity in the 2005-2006 school years.

But I did not work for the Green Bay District during the 2005-2006 school year. Why not? I was supposed to. Isn't that what the term "reasonable assurance" means? Doesn't the law provide penalties for making false statements to obtain or deny benefits?

I worked again for the Green Bay District during the 2006-2007 school years. Near the end of the year, I received a letter from Mr. Wilson saying that I was no longer on the sub list. No reason was given. Just that I had to reapply, - for a job that I had been doing for the past six years.

In November, 2007, I contacted our substitute teacher union leader - explained to him the situation - and he thought that I should be subbing. A grievance was filed in December of 2007 - or so I thought. It actually wasn't - even through (sic) I was told it was filed. In spring of 2008, I filed my own grievance and contacted the Wisconsin Employment Relations Commission. Was this a duty of fair representation on behalf of my union representative? I don't believe it was.

I have been waiting for about two years for answers to my questions. Not handing in a sheet is no way for a person to lose a position that I performed successfully for six years. Even a member of WEAC found that a ridiculous reason to lose a position. I would like to work for the Green Bay School District again.

(Signed) Chris Janesky

District's Position

As stated in the District's Motion to Dismiss the Complaint was filed well beyond the one year limitation period. Janesky's own testimony establishes that the basis for his complaint is that the District had a duty to re-hire him after May 1, 2007. He provides no contractual basis for this assertion nor has he presented any evidence establishing that the Union had an obligation to pursue a grievance on his behalf regarding a matter which occurred more than 6 months earlier. Consequently, he has failed to prove a breach of the duty of fair representation.

The Complaint was filed on October 1, 2008 based on Complainant's termination which occurred on April 30, 2007 and which became effective on May 1, 2007. His testimony established that he knew he was no longer employed as of May 1, 2007 and that, if he wanted to work for the District in the future, he would have to re-apply. He did so and then contacted the Union in December of 2007 regarding his situation. To the extent that the Complaint, construed as broadly as possible in favor of Janesky, alleges that Wilson's termination of Janesky was inappropriate it is untimely because Janesky clearly learned of his termination when he received Wilson's letter in May, 2007. By any construction of the evidence, Janesky's Complaint was filed far more than one year after the event about which he complains.

Complainant's Response

Complainant's response, received by the Commission on October 19, 2009, is set forth below in its entirety:

I am not a lawyer. I don't know lawyer talk. I can't quote legal precedent. I just don't think what happened to me was fair or just. I've talked to many teachers who think I've been treated unfairly this whole situation. The sad part of this whole situation is that this could have been resolved amicably and fairly without getting to this point.

I worked two years (the last two) for the Green Bay School District without handing in a sheet I was supposed to. A precedent (sic) was set. I worked a lot of days - followed the lesson plans left for me - and got plenty of positive feedback from the full time teachers. A person who worked for the Wisconsin Education Association Council (WEAC) told me that losing my job because I didn't hand in a sheet of paper is ridiculous. I filed my own grievance when I found out my

union representative did not, even though he told me he did. He could of at least told me that he had not filed a grievance - the decent thing to do. I guess there's no decency in this whole situation. And we're supposed to be working for kids.

As far as if I filed my complaint on time, two representatives from the Wisconsin Employment Relations Commission told me the timing of the filing was appropriate and timely. If two employees from the WERC said the timing was fine, what else was I to do?

Why did I miss the 2005-2006 school year? I filed for unemployment compensation in June, 2005, and it was denied for that summer because I had "reasonable assurance" of returning to the Green Bay School District. Who did unemployment talk to in order to make that decision? If I worked in 2005-06 school year, I'm not on probation for a second time; this situation would not have happened and I would be working for the Green Bay District (sic) right now. Which is what should be happening.

Employees have had their rights reduced or eliminated over the past number of years. This is a chance to reverse that trend. I would like to be working in Green Bay in the near future.

(Signed) Chris Janesky

DISCUSSION

Because this action is time barred the undersigned is without jurisdiction to consider the merits of Janesky's Complaint.

Section 111.07(14), Stats., made applicable to these proceedings by Sec. 111.70(4)(a), Stats., establishes a one year time limit for filing prohibited practice complaints. It provides, "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 practices alleged." This time limit is strictly construed by the Commission.

The Complainant refers, from time to time, to the fact that he did not work as a substitute teacher during the school year 2005 - 2006 as constituting the initial act that lead to his situation here. This lead to his probationary status when he was erroneously given assignments during the following school year, 2006 - 2007, and set the table for his termination on May 1, 2007. He does not specifically allege that his lack of work during the 2005 - 2006 school year was the "specific act or (prohibited practice)" referred to in the Statute nor does this record necessarily support such a conclusion. The record, as a whole, supports the conclusion that the Complainant knew of his termination, viewed it to be a violation of the statute and considered his termination to be the "specific act" of which he complains. The one year statute of limitations begins to run when "the complainant has

knowledge of the act alleged to violate the Statute.” STATE OF WISCONSIN, DEC. NO. 26676-B at 8 (WERC, 4/91). May 1, 2007, then, is the date upon which the one year statute began to run.

In his effort to extend or toll the running of the one year statute of limitations the Complainant points to three separate events. He seems to argue that one, or all, of them should allow him to proceed despite the limitation of time. First, he argues that the contact with his (former) Union Representative, Schadewald, during which time they discussed the potential of filing a grievance on Complainant’s behalf, should have been sufficient for him to have relied on the Union to pursue the grievance on his behalf, thus eliminating any responsibilities he may have had in terms of filing his prohibited practice complaint. This is the crux of his DFR allegation against the Union. Second, the Complainant points to his letter dated April 21, 2008, wherein he advises the District that he is “filing a grievance”. Although he does not specifically say so, that letter may be construed to allege the basis of his grievance to be the fact that he did not work during the 2007 - 2008 school year. Finally, he refers to having had some conversation(s) at some unspecified time around April, 2008 with WERC employees who allegedly told him that his filing of a prohibited practice complaint would be timely. This, he infers, should answer the question as to timeliness.

The parties’ collective bargaining agreement required that unless written grievances were forwarded to the Superintendent within 60 days after the facts upon which the grievance was based, the grievance would be considered waived. (Finding of Fact 14). The date of the “fact upon which the grievance is based” is May 1, 2007. The date upon which the grievance was considered waived is July 1, 2007. The record is unclear as to the specific date upon which the Complainant contacted his Union Representative, but, viewing the evidence in the light most favorable to the Complainant, that date was, at the earliest, November 1, 2007. Thus, by the time the Complainant first made contact with his (former) Union, the grievance was already four months stale. The Union cannot be charged with a duty to pursue a grievance it knows to be barred by contract, nor is its refusal to do so sufficient to waive or toll the Sec. 111.70(4)(a), Stats. time limitation whether it advised the Complainant of its refusal to pursue the grievance or not. The filing of a timely grievance may, under certain circumstances, toll the time limitations of Sec. 111.70(4)(a), Stats. A grossly untimely grievance may not.

The next action taken by the Complainant occurred on April 21, 2008 (Finding of Fact 13), when he advised the District that he was filing a grievance. On April 21, 2008 the Complainant’s “grievance” was now at least ten and one half months past due, again, construing the evidence in the light most favorable to the Complainant. The District responded to the Complainant’s “grievance” by letter dated April 30, 2008 (Finding of Fact 15) wherein it effectively denied the “grievance”. In response to that denial the Complainant took no action in furtherance of his alleged claim for a period of five more months, at which time he filed his Complaint which was now some sixteen and one half months past the date “of the act alleged to violate the Statute.” The actions of the Complainant in filing his “grievance” with the District ten and one half months after the grievance had been waived is not sufficient to waive or toll the Sec. 111.70(4)(a), Stats. time limitation.

Finally, the fact that the Complainant spoke to a member of the WERC who, allegedly, advised that his Complaint would be timely does not make it so. The record is devoid of evidence as to the facts discussed in such alleged conversations but, in any event, the off-hand comments of a member of the WERC may not morph an untimely matter into a timely one.

Dated at Wausau, Wisconsin, this 8th day of December, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

Steve Morrison, Examiner