

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LEE RICHARD RADTKE, Complainant,

vs.

WEST SALEM SCHOOL DISTRICT, Respondent.

Case 29
No. 68488
MP-4467

Decision No. 32696-C

Appearances:

Lee Richard Radtke, P.O. Box 101, West Salem, Wisconsin 54669, appearing on his own behalf.

Leslie A. Sammon, Axley Brynson, Attorneys at Law, P.O. Box 1767, Madison, Wisconsin 53701-1767, appearing on behalf of the West Salem School District.

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

On December 12, 2008, Lee Richard Radtke filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against his former employer, the West Salem School District. The allegations contained in the complaint will be identified in detail below. On March 19, 2009, the Commission formally appointed Raleigh Jones, a member of its staff, to make and issue Findings of Fact, Conclusions of Law and Order as provided in Sec. 111.07(5), Stats. On May 6, 2009, the Respondent filed a motion to dismiss the complaint. A pre-hearing conference, which was transcribed, was convened on May 8, 2009 at the Commission's office in Madison, Wisconsin. At that conference, the Examiner orally granted the Respondent's motion to dismiss. The following Findings of Fact, Conclusion of Law and Order Granting Respondent's Motion to Dismiss formalizes the decision announced at the pre-hearing conference.

FINDINGS OF FACT

Since no evidentiary hearing was conducted in this matter, the following facts were compiled from the complaint, the case file, and documents submitted by the Complainant.

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1. Complainant Lee Richard Radtke was a physical education teacher for the West Salem School District for 16 years. He is no longer employed by the District.

2. Respondent West Salem School District is a municipal employer which operates a public school system in West Salem, Wisconsin. Its offices are located at 405 East Hamlin Street, West Salem, Wisconsin.

3. On January 14, 2008, District Superintendent Nancy Burns imposed a three-day suspension on Radtke for an incident which occurred November 9, 2007.

4. On January 25, 2008, Radtke filed a Level I grievance concerning his three-day suspension with Middle School Principal Dean Buchanan. On February 13, 2008, Radtke filed a Level II grievance concerning his three-day suspension with School Superintendent Nancy Burns. Insofar as the record shows, neither individual responded to Radtke's grievance.

5. On February 12, 2008, the District placed Radtke on administrative leave pending a non-renewal hearing. With this action, the District started the non-renewal process against Radtke.

6. On March 11, 2008, a private conference was held as part of the non-renewal process. At that time, representatives of the West Salem School District and the West Salem Education Association negotiated over severing Radtke's employment with the District. The end result of their negotiations was a four-page single space document entitled "Resignation Agreement and Waiver/Release of Claims." While there were numerous provisions contained in that document, one provision was that Radtke resigned from the District effective June 30, 2008 and that the School Board accepted his resignation. Another provision was that all correspondence related to Radtke's three-day suspension and his subsequent grievance was removed from his personnel file. Another provision was that Radtke was to be paid for the three days he was suspended in January, 2008. That money was subsequently paid to Radtke. This document was signed by representatives of both the Association and the District. Radtke did not sign the document. The Association and the District entered into this Agreement over Radtke's objection.

7. On December 12, 2008, Radtke filed a complaint with the Wisconsin Employment Relations Commission against the West Salem School District. Paragraph C of his complaint contained the following three (conclusory) factual allegations:

- 1) "Statement to West Salem Board of Education, March 11, 2008, indicating defective non-renewal notice";
- 2) "No response to the enclosed grievance (violation of contractual agreement, Level II and III)"; and

- 3) “No final notice from the school board by March 15 deadline to non-renew my contract – another violation of 118.22 statute.”

Paragraph D of the WERC complaint form directs a complainant to identify the “part or parts of the applicable statute defining. . . prohibited practices alleged to have been violated.” In that section, Radtke wrote: “See highlighted parts of the enclosed copies.” Attached to the complaint were nine letters, three documents, and portions of the 2005-07 collective bargaining agreement between the West Salem School District and the West Salem Education Association. Those attachments totaled 25 pages. None of the highlighted parts of the attachments to the complaint include a reference to any statute other than Section 118.22. Finally, Paragraph E of the WERC complaint form asks, “What remedy do you seek?” In that section, Radtke wrote: “Back pay (wages lost) and reinstatement.”

8. On March 30, 2009, the District filed a Motion to Make Complaint More Definite and Certain pursuant to Wis. Adm. Code ERC §12.07(7). This motion alleged Radtke failed to comply with Wis. Adm. Code ERC §12.02(2)(c) and further alleged that his complaint was so indefinite as to hinder the District in preparing a response to said complaint.

9. Radtke responded to the District’s motion by sending the District’s counsel another copy of his complaint and the attachments, but did not identify which statutory provision(s) he alleged the District had violated. In his letter response he indicated he was leaving it to the Examiner (to determine) which statutory provision(s) had been violated. He asked that he “be able to present my case not from a violation of ‘statutory provisions’ but simply for things I recognized as being treated unfairly by the West Salem School District” and, further, that as to “statutory provisions and/or violations of law I will allow your legal expertise to determine”.

10. On April 21, 2009, Radtke came to the Commission’s office and had nearly 700 pages of documents date-stamped by the Commission’s staff. He intended to offer these documents into evidence at the hearing.

11. On April 22, 2009, the Examiner granted the District’s motion to make complaint more definite and certain. WEST SALEM SCHOOL DISTRICT, DEC. NO. 32696-A (Jones, 4/09). In the Memorandum accompanying that Order, the Examiner stated: “In order to make the complaint conform with that code provision [Sec. 12.02(2)(c)] the Complainant is to identify all the statutory provision(s) which he is alleging the District violated. This will enable the District to prepare its answer to the complaint.” Radtke was ordered to supply this information by April 29, 2009. Hearing on the complaint was set for May 8, 2009.

12. On April 29, 2009, Radtke filed a written response to the Examiner’s Order to Make Complaint More Definite and Certain. His letter did not identify any statutory provision under the Municipal Employment Relations Act which he alleged the District violated. Instead, he again requested that the Examiner “determine what statutes were violated beyond what I may have recognized within the outline when my complaint was filed on December 8, 2008.”

13. In a letter dated May 4, 2009, the Examiner notified the parties that he was converting the May 8, 2009 hearing into a pre-hearing conference.

14. At the May 8, 2009 pre-hearing conference, Radtke alleged that the District violated Sec. 118.22, Stats., by its actions. He also alleged that the District committed a hate crime (against him) by its actions. He also alleged that he was treated unfairly and illegally by the District. Radtke did not allege any MERA violations by the District.

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

CONCLUSION OF LAW

The allegations raised in the complaint fall outside the Commission's jurisdiction under Sec. 111.70(3)(a), 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 1st day of June, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner

WEST SALEM SCHOOL DISTRICT

**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 filed a motion to dismiss the complaint.

A. 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 111.70 provides the basis for prohibited practices under the Municipal Employment Relations Act (MERA).

A complainant does not have an automatic right to a hearing before the WERC on their complaint. Pre-hearing motions to dismiss are used to ferret out allegations that on their face fall outside the Commission's jurisdiction, are untimely, or are so vague that the respondent cannot prepare for hearing. PROFESSIONAL TECHNICAL COUNCIL, WEAC AND BLACKHAWK TECHNICAL COLLEGE, DEC. NO. 30023-D (WERC, 10/03). Thus, an examiner can dismiss a complaint without a hearing when the WERC lacks jurisdiction over the allegations, or the complaint is untimely, or the complaint fails to state a claim. See, for example, 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).

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 (Hornstra 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.

B. Application of Those Legal Standards Here

In order for the WERC to inject itself into a dispute, it has to have subject matter jurisdiction to do so. The Examiner explained it this way to Radtke at the pre-hearing conference:

Now, Mr. Radtke, I'm going to direct some comments directly to you. I'm first going to talk about the topic of jurisdiction. Before the WERC can conduct a hearing on the complaint we have to have jurisdiction to do so.

What I mean by the term jurisdiction is a legal basis for injecting ourselves into a dispute. The WERC does not have jurisdiction over any and all types of workplace disputes. Instead, our jurisdiction is limited to just those matters referenced in the State statutes that we administer.

The WERC administers three State statutes, but just one of them is arguably applicable to you. The statute that is arguably applicable to you is MERA. It's an acronym which stands for the Municipal Employment Relations Act, and it covers school district employees. The section in the State statutes for MERA is s. 111.70.

As a Complainant you have to allege a violation of MERA in order for the WERC to have jurisdiction over your claim. If you don't allege a violation of MERA the WERC does not have jurisdiction over your claim and we are not empowered to hold a hearing or address the merits of your dispute.¹

In the discussion which followed, it became apparent that Radtke's claims are not within the Commission's jurisdiction. The following shows this. First, he alleged that the District violated Sec. 118.22 by its actions. That section is entitled "Renewal of Teacher Contracts". It is part of Chapter 118 which is entitled "General School Operations". The WERC does not have jurisdiction over that statute. In the context of this case, our jurisdiction is limited to Sec. 111.70. Second, he alleged that the District committed a hate crime (against him) by its actions. The WERC does not have jurisdiction over that claim either. Third, he alleged that he was treated unfairly and illegally by the District. The WERC only has jurisdiction over that claim if it somehow is tied to MERA. For example, if a municipal employer treats an employee adversely because of their union activity, that is "unfair and illegal" treatment which violates Sec. 111.70(3)(a)3, Stats. However, Radtke did not raise any MERA claim at all, even after the Examiner explicitly gave him the opportunity to do so at the pre-hearing conference.²

¹ Transcript, p. 4 and 5.

² Transcript, p. 5-7.

The Examiner has reviewed the complaint's 25 pages of attachments, as well as the nearly 700 pages of documents which Radtke intended to offer into evidence. After doing so, the Examiner concludes that nothing therein raises a potential MERA claim involving Secs. 111.70(3)(a)1, 2, 3, 4, 6 or 7, Stats.

For the sake of discussion, it is assumed that Radtke meant/intended to raise a Sec. 111.70(3)(a)5 claim against the District regarding his three-day suspension, the District's failure to respond to his grievance challenging his suspension, and his non-renewal. Section 111.70(3)(a)5, Stats., makes it a prohibited practice for a municipal employer "to violate any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment affecting municipal employees. . ." This provision makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement.

There are several jurisdictional problems with my addressing the merits of those breach of contract claims. First, it is apparent that the Association and the District addressed, and settled, those contractual matters in the Settlement Agreement document which they signed. They could do that. That Settlement Agreement document precludes the Examiner from addressing the merits of those matters. Second, aside from that, another jurisdictional problem with the Examiner addressing those contractual matters is that the Commission does not generally exercise its jurisdiction to determine the merits of breach of contract allegations in violation of Sec. 111.70(3)(a)5, Stats., where the parties' collective bargaining agreement provides for final and binding arbitration. See, for example, MADISON METROPOLITAN SCHOOL DISTRICT, DEC. NO. 32065-A (Jones, 11/07), *aff'd by operation of law*, DEC. NO. 32065-B (WERC, 2/08). The Commission's rationale for not asserting its jurisdiction in such circumstances is to give full effect to the parties' agreed-upon procedures for resolving disputes under their contract. In this case, the 2005-07 collective bargaining agreement between the Association and the District contained an arbitration provision. Where a collective bargaining agreement contains a grievance arbitration procedure, it is presumed (absent an express provision to the contrary) to be the exclusive method of settling contractual disputes. MAHNKE V. WERC, 66 Wis. 2D 524 (1975). Thus, even if the matters just referenced had not been settled, the traditional method for enforcing those contractual claims would be by grievance arbitration – not by a Sec. 111.70(3)(a)5 claim. Accordingly, the Examiner finds no basis in the complaint for exercising the Commission's jurisdiction under Sec. 111.70(3)(a)5 of MERA to resolve any breach of contract claims contained in the complaint.

Since the allegations raised in the complaint fall outside the Commission's jurisdiction under MERA, the complaint has been dismissed.

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

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones /s/

Raleigh Jones, Examiner