

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-D

Appearances:

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

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

ORDER ON REVIEW OF EXAMINER'S DECISION

On June 1, 2009, Wisconsin Employment Relations Commission Examiner Raleigh Jones issued Findings of Fact, Conclusion of Law and Order Granting Respondent's Motion to Dismiss in the above captioned matter based on his determination that Lee Richard Radtke's (herein Radtke) complaint against the West Salem School District (herein District) did not raise any allegations over which the Commission has jurisdiction.

On June 5, 2009, Radtke timely filed a petition with the Commission seeking review of Examiner Jones' decision pursuant to Secs. 111.07(5), Stats and 111.70(4)(a), Stats. The parties thereafter filed written argument in support of and in opposition to the petition, the last of which was received on October 5, 2009.

Having reviewed the record and being fully advised in the premises, the Commission is satisfied that Radtke's complaint does allege that the District violated a collective bargaining agreement and thus does raise an allegation that falls within the Commission's jurisdiction under Sec. 111.70(3)(a) 5, Stats. Therefore, we make and issue the following

No. 32696-D

ORDER

- A. The Examiner's Findings of Fact are set aside.
- B. The Examiner's Conclusion of Law is reversed and the following Conclusions of Law are made:
1. Radtke's complaint alleges that the District violated a collective bargaining agreement.
 2. Section 111.70 (3)(a) 5, Stats. makes it a prohibited practice for a municipal employer to violate a collective bargaining agreement.
 3. Alleged violations of Sec. 111.70(3)(a) 5, Stats. fall within the jurisdiction of the Wisconsin Employment Relations Commission.
- C. The Examiner's June 1, 2009 Order dismissing the complaint is reversed.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of October, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

WEST SALEM SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER
ON REVIEW OF EXAMINER'S DECISION

As the Examiner correctly stated in his decision, a pre-hearing motion to dismiss a complaint should be granted only if, under a liberal interpretation of content of the complaint, no allegations are raised over which the Wisconsin Employment Relations Commission has jurisdiction. CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 1/04); CITY OF MILWAUKEE, DEC. NO. 29354 (WERC, 4/98); VILLAGE OF KIMBERLY, DEC. NO. 28759-B (WERC, 12/96); RACINE SCHOOLS, DEC. NO. 27982-B (WERC, 6/94)

With the exception of a potential alleged violation of a collective bargaining agreement by the District, the Examiner correctly concluded that Radtke's complaint does not raise any issues over which the Wisconsin Employment Relations Commission has jurisdiction. As to the alleged violation of a collective bargaining agreement, the Examiner acknowledged that Sec. 111.70 (3)(a) 5, Stats., does give the Commission jurisdiction over such an allegation. Conceding for the sake of discussion that the complaint raised Sec. 111.70 (3)(a) 5, Stats., allegations as to Radtke's three day suspension, the District's failure to respond to his grievance challenging his suspension, and his non-renewal, the Examiner concluded that he was precluded from exercising any such jurisdiction because: (1) the District and the labor organization representing Radtke had settled the violation of bargaining agreement claims; and (2) the collective bargaining agreement allegedly violated included a grievance arbitration provision which is presumed to be the exclusive mechanism for resolving such claims.

When we apply the "liberal interpretation" standard to Radtke's complaint, we concur with the Examiner's tacit determination that the complaint alleges that the District violated a collective bargaining agreement (and thus Sec. 111.70(3)(a) 5, Stats.) as to Radtke's three day suspension, the District's failure to respond to his grievance challenging his suspension, and his non-renewal. We also concur with the Examiner's holding that, if a collective bargaining agreement contains a grievance arbitration procedure, that procedure is presumed to be the exclusive mechanism for resolving alleged violations of the agreement and thus the Commission will not exercise its Sec. 111.70 (3)(a) 5, Stats., jurisdiction in such circumstances. MAHNKE v. WERC, 66 Wis. 2D 524 (1974); RACINE EDUC. ASS'N. v. RACINE UNIFIED SCHOOL DIST., 176 Wis. 2D 273 (Ct. App. 1993); GRAY v. MARINETTE COUNTY, 200 Wis. 2D 426 (Ct. App. 1996); UNITED STATE MOTOR CORP., DEC. NO. 2067-A (WERB, 5/49); HARNISCHFEGER CORP., DEC. NO. 3899-B (WERB, 5/55); MELROSE-MINDORO JT. SCHOOL DISTRICT NO. 2, DEC. NO. 11627 (WERC, 2/73); CITY OF MENASHA, DEC. NO. 13283-A (WERC, 2/77); MONONA GROVE SCHOOL DISTRICT, DEC. NO. 22414 (WERC, 3/85). However, there is an exception to this general rule: if it is proven that the union representing an employee failed to fairly represent the employee in the processing of a contractual grievance alleging a violation of contract, then the Commission will exercise its Sec. 111.70 (3)(a) 5, Stats., jurisdiction to decide the merits of the alleged violation of the

collective bargaining agreement. MAHNKE, *supra.*, GRAY, *supra.*, MILWAUKEE BOARD OF SCHOOL DIRECTORS, DEC. NO. 31602-C (WERC, 1/07).

Here, Radtke has alleged that his collective bargaining representative settled the suspension and non-renewal over his objection and thus, under the “liberal interpretation” standard, we are satisfied that the complaint asserts that his collective bargaining representative failed to fairly represent him as to these matters. Therefore, we conclude that Radtke has raised a Sec. 111.70(3)(a) 5, Stats., claim as to which it is appropriate at this point in the litigation to allow him to proceed and we have reversed the Examiner to that extent. ¹

By our ruling, we do not decide whether there was a collective bargaining agreement that applied to the matters in dispute, whether any such agreement contained a grievance arbitration procedure, whether Radtke attempted to use any such procedure, whether any settlement reached by the representative and the employer violated the duty of fair representation, or whether the employer violated a collective bargaining agreement. We have only concluded that under a “liberal interpretation” of Radtke’s complaint, he has raised a Sec. 111.70(3)(a) 5, Stats. claim that survives a pre-hearing motion to dismiss. The matter will be assigned to an examiner for further proceedings consistent with this ruling.

Dated at Madison, Wisconsin, this 27th day of October, 2009.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Judith Neumann /s/

Judith Neumann, Chair

Paul Gordon /s/

Paul Gordon, Commissioner

Susan J. M. Bauman /s/

Susan J. M. Bauman, Commissioner

¹ Consistent with ERC 12.02 (2) (c), the Examiner correctly asked Radtke to identify the provision or provisions of Sec. 111.70 (3), Stats., which he was alleging had been violated. Radtke improperly refused to do so. However, where, as here, the substance of the complaint itself makes it apparent that a claim is being presented that falls with the jurisdiction of the Commission, Radtke’s refusal does not warrant dismissal of his complaint. We note in this connection that ERC 10.01 gives the Commission discretion to waive the requirements of ERC 12.02(2)(c) unless “ a party shows that it would be prejudiced by the waiver.” Here, because the violation of contract claim is stated in the text of the complaint, we are satisfied that the Respondent employer has not been prejudiced by Radtke’s failure to comply with ERC 12.02 (2)(c).