STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

EAU CLAIRE CITY EMPLOYEES, LOCAL 284, AFSCME, AFL-CIO, Complainant,

vs.

CITY OF EAU CLAIRE, Respondent.

Case 281
No. 68375
MP-4460

Decision No. 32730-D

Appearances:

Stephen Bohrer, Assistant City Attorney, City of Eau Claire, 203 S. Farwell Street, P.O. Box 5148, Eau Claire, Wisconsin, 54702, appearing on behalf of the City of Eau Claire.

Mark DeLorme, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 824 York Street, #2, Manitowoc, Wisconsin, 54220, appearing on behalf of Eau Claire City Employees, Local 284, AFSCME, AFL-CIO.

DECISION ON MOTION TO DISMISS

On November 4, 2008, Local 284 filed a complaint alleging that the City of Eau Claire violated Sec. 111.70(3)(a)5, Stats. by failing to comply with an arbitration award issued by John Emery. Emery's original ruling was issued on October 20, 2006. He retained jurisdiction and was asked to supplement his award by the Union. He issued a verbal modification on January 31, 2007 and reduced that decision to writing on May 20, 2008. His supplementary award of May 20, 2008 included a revised order directing that:

> The City's obligation under Article 26, Section 1 is to pay a qualifying employee an injury supplement representing the difference between his or her workers' compensation benefits and 87.5% of his or her gross regular wages.

Arbitrator Emery further concluded that the benefits were to be recalculated going back to 2004.

The Union filed its Sec. 111.70(3)(a)5 complaint within one year of the issuance of the written Supplementary Award, alleging generally that the City had failed to comply with the Emery Order.

The complaint was assigned to Daniel Nielsen, who ultimately dismissed it based upon his belief that the dispute had settled. The Union disagreed and appealed the matter to the Commission which reversed the dismissal by order dated November 17, 2010. The matter was assigned to the undersigned based upon a delegation of final authority pursuant to Secs. 111.07(5) and 227.46(3)(a), Stats.

The City had originally filed a motion to dismiss which was not resolved by Examiner Nielsen and remained pending during which time I conducted an additional evidentiary hearing requested by the Union and the case is ripe for resolution on the merits.

The underlying dispute arises out of contract language requiring the City to supplement (for a period of ninety days) the temporary total disability benefits provided to employees pursuant to Ch. 102, Stats. The labor agreement provided that the City would pay the difference between 87.5% of the employee's regular pay and his workers compensation benefit.

This seemingly simple and not uncommon provision has led to a lengthy dispute between the parties as summarized above. The City's original motion to dismiss, filed in 2009, was never resolved. The City asserts that the prohibited practice complaint should be dismissed because: (1) it is barred by operation of the applicable statute of limitations; (2) alternatively it is barred by the equitable doctrine of laches; and (3) it fails to state a claim for relief.

Notwithstanding the unusual posture of this case, the City is entitled to a decision on its motion.

Statute of Limitations

The City asserts that the original complaint filed in November of 2008 is barred by operation of the one year statute of limitations contained in Sec. 111.07(14), Stats. The gist of the City's argument is that the one year statute of limitations began to run when Emery issued his oral supplementary award on January 31, 2007. The Union argues that the "oral" award itself was not enforceable until Emery reduced it to writing. It relies on Sec. 788.08, Stats., which requires the arbitration award to be in writing. The City counters that the Union waived reliance on the statutory requirement because it did not push Arbitrator Emery to produce the written document. I find that argument to be meritless. It is one thing for a party to fail to exercise its right to bring a claim but quite another to attribute the decision maker's failure to take prompt action to the party seeking to rely on it. The Union correctly awaited the production of the written supplementary award as a necessary predicate to determining whether the City was complying with the award. The complaint was timely filed within the one year period following the issuance of the written award. The City also argues that Emery's oral award extended his jurisdiction by ninety days and that his written memorialization of the oral award is a nullity because it came sixteen months after the oral version. That assumes, incorrectly, that the oral award was enforceable. As noted, Sec. 788.08, Stats., instructs otherwise.

The practice which the Union believes was contrary to the Emery award is in the nature of a continuing violation. The Union believes that the City has failed to comply with Emery's order requiring the payment of 87.5% of the gross wages ordinarily due to employees on workers compensation leave. If the Union is correct that the City's payroll practice violates the order then presumably a new violation occurs each time an employee goes on an eligible leave and fails to receive a correct payment. *See* Limestone Development Corp. v. Village of Lemont, 520 F. 3d 797, 801 (7th Cir. 2008); Barry v. Maple Bluff Country Club, 221 Wis.2d 707, 586 N.W.2d 182 (Ct. App. 1998) (recognizing concept of continuing violation under Wisconsin law).

Even without the concept of a continuing violation, if one employee covered by the labor agreement allegedly had his benefit improperly calculated within the year prior to the filing of the complaint, then the complaint is timely. The limitation period began to run from the date of the injury, not the date of the last Emery award. The City apparently does not contend that there were no employees who received Article 26 supplements in the one year period prior to the filing of the complaint. Documents admitted in earlier proceedings reflect that there were individuals who received supplements during 2008. That is sufficient to render the complaint timely.

Laches

The City focuses on the sixteen month delay between the verbal supplementary award and the written award as the basis for its assertion of the equitable defense of laches. Laches operates as a bar to a claim against "those who unduly slumber upon their rights." Flejter v. Estate of Flejter, 2001 Wi. App. 26 ¶41, 240 Wis.2d 401, 623 N.W.2d 552 (Ct. App. 2000). While there is some disagreement over the elements necessary to establish the laches defense, at the very least there must be an unreasonable delay in bringing a claim.

I conclude that the union did not unreasonably delay bringing the claim and that the delay was primarily attributable to the agency not the complainant. A litigant has no recognized obligation to badger a decision-maker into rendering a decision. Some advocates no doubt believe that hounding a judge for an overdue decision might have adverse consequences for their client. Regardless of the reason, the Union cannot be prejudiced as a result of a lack of persistence.

Failure to State a Claim for Relief

The City also moved to dismiss based upon a failure to state a claim for relief. That motion is designed to test the legal sufficiency of the claim. Weber v. City of Cedarburg, 129 Wis.2d 57, 64, 384 N.W.2d 333 (1986). A claim is sufficiently stated unless it appears that no relief can be granted under any set of facts that the complaining party can prove. Id. Here the City's motion essentially seeks to dispute the underlying claim on the merits. Those arguments will be addressed in the due course of resolving this matter on the merits and in light of the now completed record.

Accordingly, it is hereby

ORDERED

That the City of Eau Claire's Motion to Dismiss is denied in its entirety.

Dated at Madison, Wisconsin this 28th day of August, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/

James R. Scott, Examiner