STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

LOUIS C. NOTO, Complainant,

vs.

GATEWAY TECHNICAL COLLEGE

and

GATEWAY TECHNICAL EDUCATION ASSOCIATION, Respondents.

Case 72
No. 68772
MP-4493

Decision No. 32752-A

Appearances:

Emily Rupp Anderson, Alan C. Olson & Associates, 2880 South Moorland Road, New Berlin, Wisconsin 53151, appearing on behalf of Complainant Louis C. Noto.

Michael Aldana, Quarles & Brady, LLP, Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202-4497, appearing on behalf of Respondent Gateway Technical College.

Jina L. Jonen, Legal Counsel, Wisconsin Education Association Council, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of Respondent Gateway Technical Education Association.

ORDER DENYING MOTION TO DISMISS AND BIFURCATING PROCEEDINGS

Louis C. Noto ("Complainant") filed a complaint with the Wisconsin Employment Relations Commission on April 1, 2009, alleging that Respondents Gateway Technical College ("College") and Gateway Technical Education Association ("Association") had committed prohibited practices within the meaning of Sections 111.70(3)(a)1, 111.70(3)(a)3, 111.70(3)(a)5, and 111.70(3)(c) of the Municipal Employment Relations Act. On May 29, 2009, the Commission appointed Danielle L. Carne to act as Examiner and to make and issue

Findings of Fact, Conclusions of Law, and Orders, as provided in Section 111.70(5), Wis. Stats. On June 19, 2009, the College filed a partial motion to dismiss, which motion was accompanied by supporting argument. By correspondence also dated June 19, 2009, the Association joined in the College's motion. The Complainant submitted written argument in opposition to the motion on June 22, 2009. The College filed additional arguments in reply on August 4, 2009. Having considered the arguments of the parties, the undersigned concludes that the motion should be denied.

NOW, THEREFORE, it is

ORDERED

That the motion is denied.

That the proceedings in this matter are hereby bifurcated. The scheduled hearing dates of February 17, 2010, and February 18, 2010, will be devoted exclusively to the issue of whether the Association has acted in violation of its duty of fair representation. Following a decision with regard to that issue, hearing will be held, if necessary, as to any breach of contract claim against the College.

Dated at Madison, Wisconsin, this 20th day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

GATEWAY TECHNICAL COLLEGE

**MEMORANDUM ACCOMPANYING ORDER
DENYING MOTION TO DISMISS**

The Complainant is an instructor for the College and a member of the bargaining unit represented by the Association. In the complaint filed in this matter, the Complainant avers that the College undertook the following actions, allegedly in violation of the collective bargaining agreement between the College and the Association: (1) from 2000 to the present, the College did not assess the correct number of workload points for the Complainant, because it did not calculate his workload under the lecture column of Appendix A of the collective bargaining agreement, (2) from 2000 to the present, the College did not assess the correct number of workload points for the Complainant, because it did not account for certain marketing activities undertaken by the Complainant, (3) from 2000 to the present, the College under-compensated the Complainant for actual hours of instruction, and (4) the College improperly decreased the Complainant's total number of workload points when it cancelled one of his classes in 2008. Moreover, the complaint claims that the Association violated its duty of fair representation to the Complainant in relation to these alleged contractual violations.

The motion presently under consideration argues that the claims brought by the Complainant should be dismissed on two grounds. First, each of the four alleged contractual violations includes claims that reach back further than April 1, 2008, and are therefore barred by the one-year statute of limitations applicable to prohibited practice cases. Further, the second, third, and fourth claims should be barred due to a failure on the Complainant's part to exhaust the contractual grievance process.

Because of the drastic consequences of denying an evidentiary hearing on the merits, an examiner must evaluate a motion to dismiss by liberally construing the underlying complaint in favor of the complainant. RACINE UNIFIED SCHOOL DISTRICT, DEC. NO. 15915-B (Hoornstra, 12/77). Such motions shall not be granted before an evidentiary hearing has been conducted, except where the pleadings, viewed in the light most favorable to the complainant, permit no interpretation of the facts alleged that would make dismissal inappropriate. ID., ERC 12.04(2)(f).

Statute of limitations bar

It is well-established that the one-year statute of limitations applicable in prohibited practice cases begins to run when a complainant has knowledge of the act alleged to violate the Municipal Employment Relations Act, STATE OF WISCONSIN, DEC. NO. 26676-B (WERC, 4/91), or, in circumstances where the complainant did not learn of the event during the limitations period, on the date on which the complainant knew or reasonably should have known the statute was violated, PREMONTRE HIGH SCHOOL, ET. AL., DEC. NO. 27550-B (WERC, 8/93).

The College asserts here that the Complainant knew about each of the four alleged contractual violations more than one year prior to the filing of the complaint in this matter. The Complainant does not dispute this assertion, but argues that because it has been held that a cause of action does not arise until the grievance process has been exhausted, the Complainant's cause of action with regard to each of the four claims did not arise until he realized that it was futile to attempt to exhaust the grievance procedure under the collective bargaining agreement or that the Association was acting in bad faith and, in doing so, precluding him from pursuing his contractual remedies.

Although the motion to dismiss attacks the legal theory underlying the Complainant's case, asserting that futility and bad faith are not a defense to a statute of limitations bar, there is no legal support provided for that assertion. Moreover, if the Complainant's legal theory prevails, a liberal construction of the complaint permits an interpretation that would make his claims timely. Therefore, dismissal on this basis is inappropriate. This is true as to the Complainant's first claim that the College did not calculate the Complainant's workload points as it should have under the lecture column in Appendix A of the collective bargaining agreement. The Complainant asserts that he learned, on July 7, 2008, that the Union had decided not to pursue the grievance with regard to this issue and, on July 8, 2008, that the College was denying that grievance at the third step. The Complainant asserts that the intersection of these two events made it clear that the Association and College were taking the same position with regard to this issue and it, therefore, would be futile to pursue this matter through the contractual grievance process. If the Complainant's cause of action arose, as he asserts, at this point, his claim ostensibly would be timely.

The Complainant argues that his second claim, relating to workload points for marketing hours, focuses on the same question that was at the heart of the grievance concerning the calculation of workload points under the lecture column – that is, whether the Complainant should have been considered an instructor in the Business and Industry Services Division. Thus, the Complainant asserts, he realized the futility of pursuing this matter through a grievance also on July 7 and 8 of 2008. If the Complainant's cause of action arose at this point, this claim could also be found to be timely.

As to the third claim, that the Complainant was not properly compensated for actual hours of instruction, the Complainant asserts that he first discovered the alleged pay discrepancy in March of 2008. He alleges that he spent months after that discovery attempting to retrieve records related to this pay issue from the College directly and then attempting to enlist the Association's help in that regard. In October of 2008, the Complainant learned from Association representatives that the Association did not intend to pursue the issue and believed the matter to be closed. The Complainant asserts that it was at this point in time that he realized that it would have been futile to pursue his claim through the grievance process and his cause of action arose. Again, construing the complaint liberally, these assertions would make this claim timely.

The first, second, and third claims raised by the Complainant relate to pay discrepancies that allegedly reach back to 2000. With regard to each of these claims, it seems clear that the parties will focus on the question of when, in the seven or eight years during which the Complainant alleges he was being under-compensated, the Complainant reasonably should have known about the discrepancies. Although the ultimate answer to that question might limit the Complainant's recovery with regard to those claims, a liberal construction of the complaint, suggesting that the Complainant might not have had a prior opportunity to have known about the alleged violations, makes dismissal prior to an evidentiary hearing inappropriate.

As to the Complainant's fourth claim, he acknowledges that he learned that his class was being cancelled in March of 2008. He asserts that he immediately contacted an Association official when he learned about the cancellation. In April of 2008, he received a message indicating that the matter had been grieved on his behalf. In October of 2008, he inquired with the Association as to the status of the grievance and was told that it had been settled five months before, in May. He was also told that he should have received payment under the settlement. The Complainant asserts that from October of 2008 through March of 2009, he made efforts to determine whether he had received payment under the settlement. In March of 2009, the Complainant was told by another Association official that he in fact had not been included in the grievance. The Complainant contends that he realized at this point that it would have been futile to pursue this matter through the grievance process. Under the Complainant's theory, his cause of action then arose, and this claim is timely.

The College argues that the Complainant's claims should be denied because the statute of limitations does not begin to run when the Complainant discovered proof of improper motives on the part of the College and/or Association. While it is true that it is the discovery of an act that triggers the statute of limitations period to run, not the discovery of the alleged wrongful nature of the act, JOHNSON V. AFSCME COUNCIL 24, DEC. NO. 21980 (WERC, 2/90), that point does not appear to relate to what is alleged here.

Failure to exhaust contractual grievance procedure bar

As the College points out, it is the Commission's long-standing policy that it will refuse to assert jurisdiction under Sec. 111.70(3)(a)5, Wis. Stats., unless the individual employee establishes that he has exhausted the grievance procedure in the applicable collective bargaining agreement. The motion to dismiss argues that the Complainant's second, third, and fourth claims, as enumerated above, should be dismissed, because the Complainant failed to exhaust the grievance procedure with regard to those claims. The Complainant asserts that, to the extent that he did not exhaust the grievance process, he should be excused from that obligation because it would have been futile for him to have done so and because of the Association's bad faith.

Futility is certainly recognized as an exception to the exhaustion requirement. *See, e.g.,* GLOVER V. ST. LOUIS-SAN FRANCISCO RY. CO., 393 U.S. 324, 330 (1969), CITY OF MADISON,

DEC. NO. 15079-D (Yaeger, 1/78). The motion to dismiss argues that the Complainant's futility argument should be rejected because the facts presented here are not as egregious as those set forth in GLOVER, wherein the Court identified circumstances adequate to support a futility argument. Interpreting the complaint in a light most favorable to the Complainant, however, it is simply not clear that the allegations contained therein are insufficient under a futility analysis.

The College also argues that the futility exception cannot apply here because, under the applicable collective bargaining agreement, the Complainant had the right as an individual employee to invoke the grievance procedure. Thus, the College asserts, the Association cannot be said to have prevented the Complainant from pursuing his grievances. While it seems clear that the second established exception to the exhaustion requirement – the exception that allows an employee to argue that he was prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance – only applies in situations where the union has sole power under the contract to invoke the higher stages of the grievance procedures, *see, e.g.,* BEAUDETTE V. EAU CLAIRE COUNTY SHERIFF'S DEPT., 265 WIS. 2D AT 755, it is not clear that such a requirement attaches to the futility exception, *see, e.g.,* ID.[1] Therefore, even if it is accurate that the Complainant had the right under the collective bargaining agreement to pursue grievances individually, such a right does not necessarily undermine his ability to make a successful futility argument in the context of this case.

Dated at Madison, Wisconsin, this 20th day of January, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/
Danielle L. Carne, Examiner

[1] A submission by the College in support of its motion asserts that CITY OF MADISON, DEC. NO. 15079-D (Yaeger, 1/78), provides support for the following assertion: "[w]here a complainant has the ability to pursue the grievance procedure without the Union's involvement, he or she will not be excused from the failure to do so by alleging that resorting to the grievance procedure would have been futile". While that examiner case does hold that there must be a duty of fair representation component to any case alleging futility as an excuse to the exhaustion requirement, it does not appear to clearly stand for the proposition that the futility exception will not apply in situations where the complainant has a contractual ability to proceed with a grievance individually.

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