STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JAMES V. ENDRES, Complainant,

v.

TEAMSTERS UNION LOCAL 695, and
CITY OF MADISON – MADISON METRO, Respondents.

Case 266
No. 69415
MP-4560

Decision No. 33021-B

Appearances:

Ms. Jill M. Hartley, Previant, Goldberg, Uelmen, Gratz, Miller & Brueggeman, S.C., Attorneys at Law, 1555 North Rivercenter Drive, Suite 202, P. O. Box 12993, Milwaukee, Wisconsin 53212, appearing on behalf of Teamsters Local Union 695.

Mr. Roger Allen, Assistant City Attorney, City of Madison, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53710, appearing on behalf of City of Madison – Madison Metro.

Mr. Michael Deiters, Labor Relations Manager, City of Madison, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53710, appearing on behalf of City of Madison – Madison Metro.

Mr. James V. Endres, 5794 Ledgemont Court, Madison, Wisconsin 53711, appearing *pro se*.

ORDER GRANTING CITY OF MADISON'S MOTION TO DISMISS

This is the second decision related to various motions filed by Respondents in this matter. Relevant procedural history set forth in the first such decision (ENDRES I)[1] is

[1] See CITY OF MADISON (MADISON METRO), DEC. NO. 33021-A (Carlson, 4/10).

summarized below to identify and establish the context of Respondent City of Madison's sole remaining motion. As explained below, that motion, though characterized by the City as a request to reconsider the Examiner's denial of its motion to dismiss in Endres I, is in essence another motion to dismiss and will be treated as such.

Procedural History and Order, as Set Forth in Endres I

The gravamen of Mr. Endres Complaint is that the City committed prohibited practices in violation of Sec. 111.70(3)(a)5, Stats., when the City: 1) relieved him of his duties as a motorcoach driver on December 30, 2008, pending the results of an independent medical exam (IME); 2) failed to timely schedule the IME; and 3) caused him to lose sick time, holiday and overtime pay, and to sustain other damages, as a result of its allegedly dilatory IME scheduling. However, the Complaint does not specify any provisions of the collective bargaining agreement (CBA) that the City allegedly violated.

Complainant also alleges that the Union breached its duty of fair representation under Sec. 111.70(3)(b)1, Stats., regarding the grievance he had filed against the City on or about May 26, 2009, by disregarding him during settlement negotiations and settling his claim for an arbitrary amount far less than that which he alleges would have made him whole.[2]

On February 5, 2010, the City filed a "Motion to Dismiss or in the Alternative Motion to Make More Definite and Certain" and a brief supporting those motions. On February 8, 2010, the Union filed a "Motion for More Definite Statement".

Following briefing on the motions, the Examiner issued an Order on April 15, 2010, that 1) denied the Union's Motion for a More Definite Statement as moot; 2) denied the City's Motion to Dismiss; 3) granted the City's Motion to Make More Definite and Certain; and 4) directed Complainant Endres, within fifteen days of the date of this Order, to file a statement with the Commission identifying the language in the collective bargaining agreement(s) in force and effect from December 30, 2008, through May 1, 2009 (the period during which Complainant alleges the City relieved Complainant of his duties) that the Complainant believes the City had violated.[3]

Procedural History Following Issuance of Endres I

Complainant timely complied with the Examiner's Order by identifying the contract language that he believed the City violated in a letter dated April 25, 2010, and received by the Commission on April 28, 2010. Mr. Endres also attached to this letter a copy of the

[2] Though pending, Mr. Endres' claim against the Union is not at issue in this decision.

[3] See CITY OF MADISON (MADISON METRO), DEC. NO. 33021-A (Carlson, 4/10).

contractual provisions in the CBA[4] that set forth the grievance procedure, entitled, "Article 8 – Grievance and Arbitration".[5]

On May 6, 2010, the Examiner issued a briefing schedule regarding Complainant's submissions, pursuant to which the City timely filed a response on May 19, 2010, and Complainant timely filed a reply on June 4, 2010.

Having considered the pleadings, submissions and arguments of the parties, the Examiner makes and issues the following

ORDER

The City of Madison's Motion to Dismiss is granted.

Dated at Madison, Wisconsin, this 6th day of August, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

[4] The CBA at issue is the "Labor Agreement Between the City of Madison Department of Transportation Transit Division and Teamsters Union Local No. 695 affiliated with the International Brotherhood of Teamsters", for the period covering January 1, 2008 – December 31, 2009.

[5] The grievance and arbitration procedure set forth in Article 8 consists of three steps. Complainant did not quote or otherwise refer to Steps One and Three. These steps address grievance initiation and arbitration, respectively. Complainant has not relied on these sections and the Examiner finds consideration of them unnecessary to the disposition of the instant motion.

CITY OF MADISON

MEMORANDUM ACCOMPANYING ORDER
GRANTING CITY OF MADISON'S MOTION TO DISMISS

POSITIONS OF THE PARTIES

Complainant's Position Regarding the Provisions of the CBA Allegedly Violated

Complainant identified the contractual language he believes the City violated in a letter dated April 25, 2010:

> In response to your request for a statement identifying the language in the collective bargaining agreement(s) in force from December 30, 2008 through May 1, 2009, I am enclosing a copy of Article 8.2 on page 10 of the Union contract. "In the event an employee or the Union has a grievance against the Employer, there shall be no suspension or interruption of work on account of such grievance and said grievance difference or dispute shall be handled in the following manner:" A copy of the rest of this portion of the Union contract is attached.
>
> This clearly states, in particular, under Step Two: (emphasis added)
>
> Step Two
>
> Any grievance which has not been properly adjudicated shall be reduced to writing within seven (7) days of completion of the above step.
>
> The complaint shall then be scheduled for hearing before the Joint Employer and Union Grievance Committee at the next scheduled meeting or at such other times as may be deemed necessary by Employer and Union representatives. Failure of either party to meet as provided herein shall permit the other party to immediately proceed to arbitration.
>
> The Joint Committee shall, **upon receipt of written notification that a dispute exists,** affix an identification number and place the dispute upon its docket. The Joint Committee shall convene quarterly meetings or at such time to the mutual convenience of the Committee. The Joint Committee shall have the authority to formulate rules of procedure to govern the conduct of its proceedings. In addition, the Joint Committee shall have

> authority to refer deadlocked disputes back for further negotiations if it deems sufficient progress has not taken place or to arbitration, as appropriate, for a neutral third party as provided for below for conflict resolution. Any decision reached by a majority of the members of the Committee shall be final and binding on the parties; provided, however, the Joint Committee shall have no authority to change, modify, or add to or detract from any of the terms of this Agreement.

I also believe that my Weingarten Rights, Article 22.1, page 19, were violated.[6]

(Bold typeface added by Complainant.)[7]

In sum, Complainant appears to argue that the City violated portions of Sec. 8.2 and Sec. 22.1 of the CBA.

City's Response

The City responded on May 19, 2010, in relevant part:

> This letter is submitted in response to your order of May 6, 2010. The City respectfully requests that you reconsider your decision on the City's Motion to dismiss given the Complainant's failure to comply with your prior order that he amend his complaint to make it more definite and certain.
>
> . . .
>
> The Complainant's April 25, 2010 letter is his response to that Order. However, his letter fails to comply with the terms of your order. Instead of offering a citation to any section relevant to IME's, the Complainant has recited the contract provisions relating to Step Two of the grievance process. The Complainant provides neither rationale nor explanation of the relationship of this

[6] Section 22.1 of the CBA states:

> The Employer shall not discipline any employee without just cause. **Weingarten Rights.** When an employee is called in to discuss a matter which is expected to result in disciplinary action, the employee shall be so informed as to the cause for such action and shall be entitled to have a Union representative present if the employee so requests.

[7] Complainant also asserts, "At no time did Madison Metro have any written or oral communication with me regarding my work status." However, because he does not identify any contract provision expressly or implicitly mandating such communication, this allegation is insufficient to support a prohibited practice claim and accordingly will be disregarded.

> section to the scheduling of IME's. On its face and in fact, this section is entirely unrelated to the scheduling of IME's . . . .
>
> . . .
>
> The Complainant has failed to make his complaint more definite and certain. Therefore, in the event that the Complaint is not dismissed, the best that the City can offer at this point is a general denial of the averments, whatever they may be. The City did not violate any provision of the Collective Bargaining Agreement when it scheduled the Complainant's IME.

Complainant's Reply

Complainant's June 4 reply acknowledges the difficulty in making his Complaint more definite and certain, where the Union and the City "failed to be explicit in the contract they signed regarding an expedient time for an IME to occur." "This", according to Complainant, "is a defect in the document." Complaint also notes that although under Sec. 12.1, the employer schedules the IME, no time frame is mentioned.[8] He adds that such ambiguity should be construed against the employer as a signatory to the contract, and that because the IME provision benefits the employer, "it is incumbent on [the City] to set the time limit for completion of the IME." Lastly, he argues that "[w]ith nothing specifically stated, the time frame should revert to what is reasonable and proper", and that four months is *per se* unreasonable.

Analysis

Nature of City's Pending Motion

Before analyzing the City's motion, its nature merits clarification. The Order in ENDRES I directed Complainant to identify the language in the CBA that the Complainant believes the City had violated. Complainant responded to that Order by timely identifying portions of Sec. 8.2 and Sec. 22.1. In its May 19 response, the City "request[ed] that [the Examiner] reconsider his decision on the City's Motion to dismiss given the Complainant's failure to comply with [the Examiner's] prior order that he amend his complaint to make it more definite and certain.

The Examiner interprets the City's motion to reconsider the denial of the City's motion to dismiss in ENDRES I as a separate motion to dismiss. In ENDRES I, the Examiner denied the City's motion to dismiss but granted its alternative motion to make the Complaint more definite and certain, pursuant to Secs. ERC 12.04(2)(b) and 12.02(7), Wis. Adm. Code. The essential

[8] Section 12.1 of the CBA states, "All employees shall submit to a physical examination as often as deemed necessary by the Employer, and the initial examining physician shall be a physician designated by the Employer. Physical examination shall mean any physical, medical or mental examination.

basis for this decision was that the Complaint was so indefinite as to hinder the City in the preparation of its answer to the Complaint, because Complainant had not alleged any contractual violations on which to base any claim that the City committed prohibited practices in violation of Sec. 111.70(3)(a)5, Stats.

By simply identifying portions of Sec. 8.2 and Sec. 22.1, Complainant complied with the Examiner's Order to identify those portions of the CBA that Complainant *believes* the City violated. In so doing, the Complainant made his Complaint more definite so as to allow Respondent to prepare an Answer.

The mere identification of alleged contractual violations, however, begs the question of whether the Complaint states a claim on which relief could be granted – the essence of a motion to dismiss and a challenge the City now raises. As noted in ENDRES I:

> "the complaint must be liberally construed in favor of the complainant and the motion [to dismiss] 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, DEC. NO. 15915-B (HOORNSTRA WITH FINAL AUTHORITY FOR WERC, 12/77) AT 3; WAUSAU INSURANCE COMPANY, ET AL., DEC. NO. 30018-C (WERC 10/03) AT 7.

CITY OF MEDFORD AND IBEW LOCAL 953 (PERNSTEINER), DEC. NO. 30537-B (WERC, 2/04) (BRACKETED LANGUAGE ADDED). *See also* Secs. ERC 12.01 and ERC 12.04(2)(f), Wis. Adm. Code.

Here, the City argues that the cited contractual provisions not only weren't violated but are wholly unrelated to the facts alleged to constitute prohibited practices within the meaning of Sec. 111.70(3)(a)5, Stats. As noted in ENDRES I, absent the City's violation of "any collective bargaining agreement previously agreed upon by the parties with respect to wages, hours and conditions of employment", Sec. 111.70(3)(a)5, Complainant's prohibited practice claims cannot survive. Thus, the issue before the Examiner is whether any interpretation of the facts alleged in the Complaint, construed liberally in favor of Mr. Endres, would support a conclusion that the City violated Secs. 8.2 or 22.1 of the CBA.

Whether the Alleged Facts Could Be Interpreted to Violate Secs. 8.2 or 22.1 of the CBA

As noted above, Complainant alleges that the City committed prohibited practices in violation of Sec. 111.70(3)(a)5, Stats., when the City: 1) relieved him of his duties as a motorcoach driver on December 30, 2008, pending the results of an independent medical exam (IME); 2) failed to timely schedule the IME; and 3) caused him to lose sick time, holiday and overtime pay, and to sustain other damages, as a result of its allegedly dilatory IME scheduling.

These allegations cannot conceivably support a conclusion that the City violated Secs. 8.2 or 22.1 of the CBA, because the allegations precede, and have nothing to do with, the procedures set forth in the cited CBA provisions. Article 8 – Grievance and Arbitration, as the title suggests, sets forth the procedures for grievance and arbitration. Sec. 8.2 does prohibit any suspension or interruption of work, but "on account of such grievance . . . ." The remainder of Sec. 8.2 cited by Complainant addresses step two of the grievance procedure. The language in Sec. 8.2 that Complainant highlights, "upon receipt of written notification that a dispute exists" refers to when the Joint Committee shall affix an identification number and place the dispute upon its docket. In sum, the allegations that support Mr. Endres' claim for damages (his relief from duties pending satisfactory results of an IME and the City's allegedly unreasonable delay in scheduling that IME) precede and do not relate substantively to the grievance procedure requisites set forth in Article 8. Accordingly, Complainant's allegations cannot support a violation of the provisions set forth in that Article.

Complainant fares no better regarding Sec. 22.1 of the CBA. That section prohibits discipline without just cause, and expressly recognizes an employee's "Weingarten rights", *i.e.*, "[w]hen an employee is called in to discuss a matter which is expected to result in disciplinary action, the employee shall be so informed as to the cause for such action and shall be entitled to have a Union representative present if the employee so requests." Sec. 22.1, CBA.

Mr. Endres was relieved from his duties for medical reasons, pending the satisfactory results of an IME, not for disciplinary reasons. And to the extent that the alleged violation of Sec. 22.1 may be interpreted to relate to the manner in which the Union handled his grievance, such allegations are subsequent to, and have nothing to do with, the City's decision to relieve him of his duties or the allegedly unreasonable delay by the City in scheduling an IME. Thus, the Complainant's allegations underlying his claim for relief cannot support a violation of Sec. 22.1 of the CBA.

Complainant's Additional Arguments

Complainant presents various alternative arguments in his June 4 reply that are similarly unavailing. He cites Sec. 12.1 of the CBA, which states in part, "[a]ll employees shall submit to a physical examination as often as deemed necessary by the Employer, and the initial examining physician shall be a physician designated by the Employer . . . ." Complainant acknowledges that "no time frame is mentioned" in this section. More problematic is that Complainant did not cite or otherwise identify this section in his April 25 response to the Examiner's Order. To allow him to do so in his June 4 reply, rather than in his initial Complaint or his April 25 response to the Examiner's Order, effectively would permit him to circumvent the portion of the Order directing him to file within 15 days a statement with the Commission identifying the language in the CBA that the Complainant believes the City had violated. The Examiner declines to undertake any analysis that would contravene his prior Order.

Because Complainant has not alleged any facts that could support a violation of Secs. 8.2 and 22.1 of the CBA, he is left to argue that even absent any contractual violations, he is still entitled to relief. Yet he does not cite any legal authorities supporting his theories of relief. For example, he characterizes the absence in the CBA of an express time period for scheduling an IME as a "defect". However, the Examiner is unaware of any authority for the proposition that the mere absence of a contractual term that one party to, or a third-party beneficiary of, a contract desires, entitles that party or third-party beneficiary to unilaterally write the desired term into the contract.

Complainant also maintains that the absence of a time limit for scheduling an IME renders the contract ambiguous, and that such ambiguity should be construed against the employer as a signatory to the contract. This argument falls short for various reasons. First, the mere absence of an express time limit in the CBA for scheduling an IME does not necessarily render the CBA language ambiguous. "We find no authority that mere silence is the equivalent of ambiguity." KUEHN V. SAFECO INS. CO. OF AMERICA, 140 WIS.2D 620, 626-627, 412 N.W.2D 126, 128 - 129 (CT. APP.1987). Moreover, even assuming *arguendo* that the absence of such a time limit creates a contractual ambiguity, it does not follow that the contract should be construed against the employer, merely because the City is a signatory to the contract. The CBA has signature lines for multiple representatives of both the City and the Union; both the City and the Union are signatories.

Complainant additionally contends that the City was obligated to set a time limit for completing the IME, because the contractual provision allowing IME's, Sec. 12.1, benefits the City. However, he cites no authority for his apparent position that a contractual provision benefitting one party obligates that party to draft a related provision. Moreover, this contention ultimately cannot be considered, because, as noted above, Sec. 12.1 of the CBA was not identified in Complainant's April 25 response.

Lastly, Complainant contends that "[w]ith nothing specifically stated, the time frame [for scheduling an IME] should revert to what is reasonable and proper", and that four months is *per se* unreasonable. This argument also must be disregarded, because Complainant's reference to Sec. 12.1 – the only section he cites that even addresses IME's – was not timely made in response to the Examiner's Order. Put another way, because Complainant did not timely identify the CBA provision affording the City a contractual right to require IME's, he is foreclosed from arguing that a reasonable time period for *performance* of that contractual right is implied in the contract.

Conclusion

For all of the foregoing reasons, the City's Motion to Dismiss is granted.

Dated at Madison, Wisconsin, this 6th day of August, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

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33021-B