

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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**PULASKI BUS DRIVERS' ASSOCIATION**, Complainant,

vs.

**PULASKI COMMUNITY SCHOOL DISTRICT**  
and **MEL E. LIGHTNER**, Respondents.

Case 44  
No. 69690  
MP-4581

**Decision No. 33037-A**

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**Appearances:**

**Attorney Melissa Thiel Collar**, Legal Counsel, Wisconsin Education Association Council, 2256 Main Street, Green Bay, Wisconsin 54311, for the Complainant.

John E. Thiel Law Office, LLC, by **Attorney John E. Thiel**, P.O. Box 7560, Appleton, Wisconsin 54912-7075, for the Respondent.

**ORDER ON MOTION TO DISMISS COMPLAINT**

On March 17, 2010, the Complainant, Pulaski Bus Drivers' Association, filed a complaint with the Wisconsin Employment Relations Commission alleging that the Respondents, Pulaski Community School District and Mel E. Lightner, had committed prohibited practices under Sec. 111.70(3)(a)1 & 3, Wis. Stats., with respect to its issuance of a disciplinary suspension to bargaining unit member Mary Schroeder on March 1, 2010, alleging that the discipline was, in part, due to hostility toward Schroeder's protected, concerted activity as an officer of the Union. On May 1, 2010, the Complainant filed an Amended Complaint alleging an additional violation of Sec. 111.70(3)(a)4, Wis. Stats., growing out of the Complainant's request for documentary material relating to the discipline and the Respondents' subsequent demand that the Complainant reimburse the Respondents for costs associated with gathering and providing the documents.

On May 18, 2010, the Respondents filed a Motion to Dismiss both the original Complaint and the Amended Complaint. On June 9, 2010, the Respondents filed an Answer and Affirmative Defenses to the Amended Complaint. Pursuant to a briefing schedule, the parties submitted written arguments regarding the Motion to Dismiss, which were received by July 15, 2010.

No. 33037-A

The Examiner having considered the parties' arguments, and based upon the pleadings and attached exhibits in the record

NOW, THEREFORE, it is

**ORDERED**

That Respondents' Motion to Dismiss the allegations that the Respondents violated Secs. 111.70(3)(a)1 and 3, Stats. by refusing to follow the contractual grievance procedure is granted. The remaining portions of the Amended Complaint alleging that the Respondents violated Secs. 111.70(3)(a)1 and 3, Stats. by disciplining the employee due, in part, to hostility toward her protected, concerted activity and that the Respondents violated Sec. 111.70(3)(a)4, Stats. by charging the Complainant for the costs of responding to its document request are not dismissed, but are held in abeyance pending completion of an underlying grievance arbitration proceeding.

Dated at Fond du Lac, Wisconsin, this 23rd day of July, 2010.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner

**PULASKI COMMUNITY SCHOOL DISTRICT**

**MEMORANDUM ACCOMPANYING ORDER**  
**ON MOTION TO DISMISS COMPLAINT**

In this case, the allegations of the Amended Complaint assert, *inter alia*, that Mary Schroeder was suspended for two days as a result of a traffic accident with her school bus and was subsequently required to submit to regular review of video tapes recorded of her performance as a bus driver. It is further alleged that the discipline was in part due to the Respondents' hostility toward Schroeder's protected, concerted activity, and that this action violated Sec. 111.70(3)(a)1 and 3, Stats. It is further alleged that the Complainants grieved the discipline, that the Respondents violated the collective bargaining agreement by refusing to follow the contractual grievance procedure in violation of Sec. 111.70(3)(a)1 and 3, Stats., and further that the Complainant requested copies of documents pursuant to its investigation of the discipline and that the Respondents required reimbursement from the Complainant for the costs of gathering and providing the document, in violation of Sec. 111.70(3)(a)4, Stats. As and for relief, the Amended Complaint seeks to have the discipline rescinded, Schroeder's personnel record to be expunged and that Schroeder be made whole for any losses occurred as a result of the discipline. The Amended Complaint also requests cease and desist orders against the Respondents for their prohibited conduct and that the Respondents be required to post any accompanying notices deemed appropriate by the Commission for the Respondents' alleged violations and pay the Complainants' costs and attorneys fees.

The Respondents' Motion to Dismiss asserts that the Amended Complaint fails to state a claim upon which relief can be granted. It further asserts that considering the allegations of the Amended Complaint in the light most favorable to the Complainant, the pleadings do not state a valid cause of action and must be dismissed as a matter of law.

The Commission's standard of review for Motions to Dismiss is set forth in Wis, Admin. Code §ERC 12.04(f):

(f) *To dismiss.* Motions to dismiss shall state the basis for the requested dismissal. A motion to dismiss 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 fact alleged that would make dismissal inappropriate.

Here the allegations regarding the issuance of the discipline allege that the decision was based, at least in part, on hostility toward the employee's protected, concerted activity. This is based upon the allegation that she had caused a contentious grievance to be filed in the recent past, which upset the Respondents, and that in his investigatory interview the Respondent Lightner allegedly asked the employee about her Union activities and suggested that they may have contributed to the accident in question. The Complainant likewise asserts that the decision to bypass the grievance process by going directly to a Board hearing and the threat to show the

Board the video of the accident was, in part, retaliation for the Complainant's protected concerted activity in refusing to agree to accept the discipline and waive the employee's grievance rights. With respect to the allegations regarding the Respondents' refusal to honor the Complainant's document request without being reimbursed for the costs of gathering and providing the requested documents, the Complainant asserts that this, too, was in retaliation for the Complainant's protected, concerted activity.

Where the parties have agreed to a contractual process for resolving disputes, the Commission will defer disputes to arbitration as long as they meet certain criteria. The Commission's criteria for deferral to arbitration are:

- (1) The parties must be willing to arbitrate and renounce technical objections which would prevent a decision on the merits by the arbitrator;
- (2) The collective bargaining agreement must clearly address itself to the dispute; and
- (3) The dispute must not involve important issues of law or policy. SCHOOL DISTRICT OF CADOTT COMMUNITY, DEC. NO. 27775-C (WERC, 6/94).

The first two criteria have been established by the fact that the underlying dispute is, in fact, currently awaiting grievance arbitration and that the contract does address itself to the dispute, that being just cause for discipline. The Complainant's contentions that the discipline issued to the employee, and the Respondents' charging for the costs of provision of requested documents, was based in part on its hostility toward the specific exercise of protected rights, however are important issues of law. As such, they cannot be summarily dismissed without an evidentiary hearing to fully develop the record, nor can they be deferred to arbitration. Nevertheless, the Commission has recognized that in cases where there is potential overlap between the issues raised in the complaint, interference with the exercise of protected rights, and an underlying grievance arbitration proceeding, it is appropriate to hold the complaint in abeyance pending the outcome of the grievance arbitration. STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, DEC. NO. 31384-B (WERC, 11/2/05) Here, the underlying grievance, in which arbitration is pending, addresses whether the employer had just cause for disciplining the employee. Further, the record here reflects that the Respondents have, in fact, provided the requested documents, and that the only questions remaining are whether, and to what extent, the Respondents can charge for the costs of providing the documents. This question, too, is something that the arbitrator can address in issuing his award. To the extent that these issues are not resolved in the arbitration, the prohibited practice complaint process can address them later, if need be. However, in the interests of economy and the optimal allocation of resources it makes sense to await the resolution of the arbitration process before moving forward with the prohibited practice complaint.

The allegation that the Respondents violated Secs. 111.70(3)(a)1 and 3, Stats. by refusing to follow the contractual grievance procedure is dismissed. This allegation is based upon

Lightner's letter to Union Grievance Chair Lois Selle on March 9 responding the grievance. In that letter, Lightner informed Selle that the Board of Education would be hearing the grievance and that part of the employer's presentation would include a viewing of the video tape from the employee's bus recording the accident. Article 4, Section 4.04 of the contract specifies that grievances are to be taken up orally with the employee's supervisor at Step 1, are to be presented to the supervisor in writing at Step 2, are to be presented to the District Administrator at Step 3 and, if not resolved at Step 3 may be presented to the Board at Step 4, either within 10 days of the Administrator's Step 3 response, or where there is no response, within 15 days of the presentation of the grievance to the Administrator. The record reveals that here the Administrator, acting in the capacity of supervisor, issued the discipline. Thus the Step 2 submission went to the Administrator, Lightner. Because he was also the Administrator, however, the filing also had the effect of a Step 3 submission. That being the case, Lightner's response to Selle was, in effect, a recognition that the next step in the process would be to present the grievance to the Board and he apparently assumed that the Union would do so rather than drop the grievance at that point. Further, his reference to presenting the video was not, in my view, a threat, since such a review would be a logical aspect of the Board's decision making process. Thus, Lightner did not violate the grievance procedure by informing Selle on March 9, 2010 that the grievance would be heard by the Board and that the video tape would be presented at the hearing. This action did not, therefore, violate Secs. 111.70(3)(a)1 and 3, Stats. and that cause of action is dismissed.

Dated at Fond du Lac, Wisconsin, this 23rd day of July, 2010

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

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John R. Emery, Examiner