

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

DAVIN H. PICKELL, Complainant

vs.

**THE CITY OF MADISON,
DAVID CIESLEWICZ,
JANET PIRAINO,
BRAD WIRTZ,
MICHAEL MAY,
MARK CLEAR,
LAUREN CNARE,
TOM CARTO,
DEIRDRE GARTON,
LINDA BALDWIN,
AFSCME LOCAL 60,
AFSCME COUNCIL 40,
STEVEN WOLFF,
et al.,
Respondents**

Case 271
No. 70476
MP-4644

Decision No. 33268-A

Appearances:

Mr. Davin Pickell, 17 Merrill Crest Drive, Madison, Wisconsin 53705, on his own behalf.

Attorney Patricia Lauten, 210 Martin Luther King, Jr. Boulevard, Room 401, Madison, Wisconsin 53703, on behalf of the City of Madison, David Cieslewicz, Janet Piraino, Brad Wirtz, Michael May, Mark Clear, Lauren Cnare, and Tom Carto.

Attorneys Jonathan Swain and Kristofor Hanson, Lindner & Marsack, S.C., Attorneys at Law, 411 East Wisconsin Avenue, Milwaukee, Wisconsin 53202, on behalf of Deirdre Garton, Linda Baldwin O'Hern, and Steven Wolff.

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Mr. Jack Bernfeld, Staff Representative, Wisconsin Council 40, AFSCME, AFL-CIO, 8033 Excelsior Drive, Suite “B”, Madison, Wisconsin 53717-1903, on behalf of AFSCME Local 60 and AFSCME Council 40.

ORDER DENYING MOTION TO WITHDRAW
COMPLAINT WITHOUT PREJUDICE

On December 30, 2010, the Complainant, Davin Pickell, filed a complaint with the Wisconsin Employment Relations Commission alleging violations of “one or more of the following sections of the Wisconsin Statutes: 111.70(3)1, 111.70(3)2, 111.70(3)3, 111.70(3)4, 111.70(3)5”.¹ On February 9, 2011, Respondents AFSCME Local 60 and AFSCME Council 40 filed a motion for summary judgment and, in the alternative, a motion to make the complaint more definite and certain. Also on February 9, 2011, Respondents Deirdre Garton, Linda Baldwin O’Hern, and Steven Wolff filed a motion to dismiss the complaint. On February 11, 2011, Respondents City of Madison, David Cieslewicz, Janet Piraino, Brad Wirtz, Michael May, Mark Clear, Lauren Cnare, and Tom Carto filed a motion to dismiss the complaint and, in the alternative, a motion to make the complaint more definite and certain. On February 21, 2011, the undersigned established a briefing schedule related to the above-identified motions. The briefing schedule provided that the Complainant was to respond to the motions no later than March 21, 2011.

On March 21, 2011, the Complainant sent an e-mail communication to the undersigned and the Respondents. In that message, the Complainant made what was presented as a preliminary, abbreviated response to the Respondents’ pending motions, but the Complainant also made a motion to withdraw his complaint in this matter without prejudice. The Complainant asserted that health-related issues preclude him from responding to the various motions and from prosecuting his claims at this time, but that he intends to pursue the complaint “at some point in the near future”.

On March 22, 2011, the undersigned directed the Respondents to provide, no later than April 5, 2011, any response to the Complainant’s motion to dismiss his case without prejudice. The responses provided by the Respondents, all of which were received by April 4, 2011, objected to the Complainant’s request that he be allowed to withdraw his complaint without prejudice, asserting that the Complaint should either be withdrawn with prejudice by the Complainant or dismissed with prejudice by the undersigned, pursuant to the various pending Respondent motions.

¹ These numbers do not represent accurate references to the Wisconsin Statutes. Given the identity of the parties listed as Respondents in this case, it is fair to assume that the complaint intends to cite to some or all of Section 111.70(3)(a), Wis. Stats., which outlines prohibited practices by a municipal employer, to some or all of Section 111.70(3)(b), Wis. Stats., which outlines prohibited practices by a municipal employee, and to Section 111.70(3)(c), Wis. Stats., which outlines prohibited practices by “any person”.

Having considered the Complainant's motion to withdraw without prejudice, as well as the Respondents' objections to that motion, it is determined that the Complainant's motion should be denied.

NOW, THEREFORE, it is

ORDERED

That the Complainant's motion to withdraw the complaint without prejudice is denied.

That the Complainant shall have until Friday, May 13, 2011, either to withdraw the complaint with prejudice, to provide any additional response to the Respondents' pending motions of February 9 and February 11, 2011, or to provide a substantial explanation as to why he is prevented from effectively prosecuting this case.

Dated at Madison, Wisconsin, this 18th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

THE CITY OF MADISON

MEMORANDUM ACCOMPANYING ORDER

The Municipal Employment Relations Act, which is the statutory framework under which the present complaint has been brought, does not address the withdrawal of a prohibited practice complaint after it has been filed and, thus, also does not give guidance as to whether such withdrawal is to be with or without prejudice. The Employment Relations Commission administrative code provides the following regarding the subject of withdrawal:

Withdrawal. Any complaint may be withdrawn at any time prior to the issuance of a final order based on it, by motion granted by the commission or examiner. A motion to withdraw shall be granted unless withdrawal would result in an injustice to any party. The commission shall not refund fees based on a withdrawal of a complaint.

ERC 12.02(4)(b). This provision does not provide any express guidance as to whether the withdrawal of a complaint is to be with or without prejudice.

In the past, the Commission has held that a complainant shall not be allowed to withdraw a complaint without prejudice, except where there is good cause shown. CITY OF GREEN BAY AND GREEN BAY BOARD OF EDUCATION, DEC. NO. 10697-A (12/71), *see also* CITY OF SUPERIOR, DEC. NO. 10681-A (Fleischli, 12/71). More recently, the Commission has provided that the preceding investment of time and other resources by respondents to interest arbitration and election petitions are appropriate considerations when determining whether dismissal without prejudice is appropriate. CITY OF MILWAUKEE DEC. NOS. 30296 AND 30297 (03/02), MILWAUKEE CHAMBER ORCHESTRA, DEC. NO. 31580 (01/06). Dismissal *with* prejudice is an appropriate way to acknowledge and respect the expenditures a responding party has incurred in the course of defending a case. MILWAUKEE CHAMBER ORCHESTRA, *supra*.

Here, the Complainant has provided an explanation in support of his motion to withdraw his complaint without prejudice. In his motion, he stated as follows:

For various reasons pertaining to the health (mental and otherwise) of myself and my family, I am not currently able to devote the time necessary to substantiate the claims made within my complaint. I am currently on a mental health leave from work, and am under a psychiatrist's care, which has effectively precluded me from being able to fully comprehend and respond to the various motions in a timely fashion.

Certainly it is not out of the question to conclude that health-related concerns could constitute good cause for allowing a complainant to withdraw a complaint without prejudice such that the claims therein could be pursued, within the applicable statutory time limits of course, at some point in the future. Here, however, several circumstances dictate against such a conclusion. First, the Complainant's assertion that there are various types of health concerns related to him and his family is a rather vague basis on which to grant such a motion. Further, it is apparent that the far-reaching nature of the complaint in this case has already required the thirteen named Respondents to devote more than minimal resources to it. The complaint contains rather sweeping allegations, including one that the statutory violations allegedly committed by the Respondents have some connection to the so-called Ponzi scheme carried out by the infamous, recently imprisoned investment advisor Bernie Madoff. The complaint also requests, as remedy for the alleged statutory violations, that the Complainant be awarded one twenty-inch jalepeño pizza every day for the rest of his life, as well as a "pony".

It is these aspects of the complaint, among others, that form the basis for the various respondent motions that are currently pending. And now the Respondents object to the Complainant's assertion that he should be allowed to re-file what the Respondents argue are frivolous claims. Even the Complainant, while maintaining that the complaint contains legitimate assertions, acknowledges in his motion to withdraw that the complaint "admittedly could have been more respectfully and responsibly written".

Given the nature of the complaint and the resources the Respondents already have invested in responding to it, it would be an injustice, as contemplated by ERC 12.02(4)(b), to allow the Complainant to withdraw the complaint without prejudice. Out of consideration for that expenditure and consideration for the Complainant's asserted health issues, the order provides the Complainant with various options for proceeding and a deadline by which to exercise one of them.

Dated at Madison, Wisconsin, this 18th day of April, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Danielle L. Carne /s/

Danielle L. Carne, Examiner

DLC/gjc
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