STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER DUNCAN, Complainant,

v.

OPEIU LOCAL 35, and OZAUKEE COUNTY, Respondents.

Case 89
No. 70304
MP-4630

Decision No. 33295-B

Appearances:

Richard Saks, Hawks Quindel, S.C., Attorneys at Law, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, Wisconsin 53201-0442, appearing on behalf of OPEIU Local 35.

Ronald Stadler, SmithAmundsen, LLC, 4811 South 76th Street, Suite 306, Milwaukee, Wisconsin 53220, appearing on behalf of Ozaukee County.

Felicia Miller-Watson, Miller-Watson Law Office, LLC, 2602 West Silver Spring Drive, Lower, Glendale, Wisconsin 53209-4292, appearing on behalf of Peter Duncan.

ORDER ON REVIEW

On May 3, 2011, Wisconsin Employment Relations Commission Examiner John C. Carlson, Jr. issued an Order Denying Motion to Dismiss in the above matter. On May 19, 2011, Ozaukee County filed a petition with the Commission seeking interlocutory review of the Examiner's Order. The parties thereafter filed written argument, the last of which was received June 6, 2011.

While we generally do not exercise our discretionary jurisdiction over interlocutory appeals, we do so here because of the nature of the legal issue raised and because issuance of a decision will not further delay the matter.

Having considered the matter and being fully advised in the premises, we issue the following

ORDER

The Order Denying Motion to Dismiss is affirmed.

Given under our hands and seal at the City of Madison, Wisconsin, this 27th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

OZAUKEE COUNTY (Peter Duncan)

MEMORANDUM ACCOMPANYING ORDER ON REVIEW

The Examiner's Order is not a "final" disposition of the complaint and thus it is discretionary as to whether we should review the merits of the interlocutory appeal. G & H PRODUCTS, INC., DEC. NO. 17630-B (WERC, 1/82); JEFFERSON BOARD OF EDUCATION, DEC. NO. 13648-B (WERC, 1/76). While we have reviewed the merits of an appeal of an interlocutory Examiner order where the legal issue involved was of general significance – CLINTON SCHOOLS, DEC. NO. 20081-C (WERC, 7/84) involving the statutory authority of an Examiner to grant interlocutory relief – we have generally declined to exercise our discretionary jurisdiction. STATE OF WISCONSIN, DEC. NO. 30124-B (WERC, 7/01); VILLAGE OF KIMBERLY, DEC. NO. 28759-B (WERC, 12/96); WAUKESHA COUNTY, DEC. NO. 28726-B (WERC, 11/96); BROWN COUNTY, DEC. NO. 27553-C (WERC, 1/94); CITY OF BELOIT, DEC. NO. 25917-C (WERC, 10/89).

Here, we conclude that it is appropriate to exercise our discretionary jurisdiction to provide guidance to these and other parties as to applicable time frames within which complaints raising duty of fair representation and violation of contract issues can timely be filed.

As the timeliness issue, the Examiner ruled as follows:

> In its seminal decision in HARLEY-DAVIDSON MOTOR CO., DEC. NO. 7166 (WERB, 6/65), interpreting analogous provisions of the Wisconsin Employment Peace Act, the Board (now the Commission) held that to encourage the parties to use the contractual dispute resolution mechanism, the one-year limitations period for an employee to file a breach of contract claim against an employer would be tolled during the employee's or union's pursuit of the contractual grievance procedure. *SEE ALSO* LOCAL 950, INT'L UNION OF OPERATING ENGINEERS, DEC. NO. 21050-F (WERC, 11/84). Refining this rule, CITY OF MEDFORD, DEC. NO. 30537-B (WERC, 2/04) added the proviso that the grievance procedure itself must have been invoked within one year after the employee knew or should have known about the breach of contract. Thus, pursuant to the foregoing standards, Duncan's complaint against the County will be timely if 1) he attempted to invoke the contractual grievance procedure within one year of the date he knew or should have known that the County had allegedly violated his rights under the collective bargaining agreement; and 2) he filed his prohibited practice complaint within one year of the date he knew or should have known that the grievance procedure had been exhausted.
>
> Duncan alleges that he was terminated on September 9, 2009, and that on or before November 11, 2009, a grievance regarding the termination was filed. Thus, Duncan's complaint clears the first timeliness hurdle noted above (a

> grievance was filed within one year of the date of termination). In addition, Duncan's complaint was filed on November 1, 2010. During the one-year period prior to that date, Duncan alleges that 1) on November 11, 2009, and April 23, 2010, OPEIU advised him that his grievance would be proceeding to arbitration, but 2) on October 15, 2010, he learned OPEIU had never filed an arbitration request. Assuming these facts to be true (as I must for the purposes of this motion), I conclude that Duncan did file the instant complaint within one year of the date he knew or should have known that the grievance procedure had been exhausted (the second element of the timeliness analysis). Thus, contrary to the County's argument, the complaint allegations against it are timely.

The Examiner's decision correctly recites our consistent holdings during the last six decades that the one year statute of limitations for an employee to file a breach of contract claim against an employer is tolled during the employee's or union's pursuit of the claim through an applicable contractual grievance procedure. Because a literal interpretation of this general holding would allow an employee to file a grievance years after the alleged breach but still timely file a breach of contract claim, in CITY OF MEDFORD we refined the general timeliness rule to add the requirement that the employee must have attempted to invoke the contractual grievance procedure within one year of the date the employee knew of should have known of the alleged contract violation. Here, based on the facts alleged in the complaint, the Examiner correctly concluded that Duncan filed his grievance within one year of his discharge (meeting the CITY OF MEDFORD requirement) and filed his complaint within one year of date he learned the union would not be arbitrating his grievance (meeting the general timeliness rule in effect for more than the last 40 years). Thus, we have affirmed his denial of the motion to dismiss.

When doing so, we acknowledge the CITY OF MEDFORD sentence cited by the County which states:

> While we still believe that invoking the grievance procedure should toll the limitations period for a Sec. 111.70(3)(a)5 claim, we hold that it is the initiation of the grievance procedure- and not its culmination- that is the relevant date for tolling the one year limitations period.

If read in isolation, this sentence could be confusing. However, when read in the context of the entire paragraph [1] in which the sentence is found, we think it apparent (as the Examiner

[1] The entire paragraph reads as follows:

> On the peculiar facts of this case, however, where the underlying breach of contract claim against the City relates to conduct that could have occurred more than a year before Ms. Pernsteiner filed her grievance, we are compelled to parse the LOCAL 950 rule a bit more carefully. While we still believe that invoking the grievance procedure should toll the limitations period for a Sec. 111.70(3)(a)5 claim, we hold that it is the initiation of the grievance procedure – and not its culmination – that is the relevant date for tolling the one year limitations period. Otherwise, a party could invoke our jurisdiction over breach of contract claims

correctly understood) that CITY OF MEDFORD was simply refining the existing timeliness rule to require that the employee file the grievance within one year of the date the employee knew of should have known of the alleged contract violation. Thus, as reflected in the Examiner's decision, we think the timeliness rules applicable to this type of complaint are discernable and internally consistent. [2]

Dated at the City of Madison, Wisconsin, this 27th day of June, 2011.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

James R. Scott /s/
James R. Scott, Chairman

Judith Neumann /s/
Judith Neumann, Commissioner

Rodney G. Pasch /s/
Rodney G. Pasch, Commissioner

---

indefinitely, so long as they first filed a grievance and followed with a prohibited practice charge within a year after exhausting the grievance procedure. Thus, on Ms. Pernsteiner's claim that the City violated the MOA by failing to implement the reorganization, the limitations period would be one year prior to April 5, 2002, the date on which Ms. Pernsteiner filed her grievance asserting that claim. The claim against the City will be untimely if Ms. Pernsteiner knew or should have known that the City had failed to implement the reorganization by April 5, 2001. While Ms. Pernsteiner alleges that her earliest opportunity to obtain this information was Cindy Pernsteiner's departure in March 2002, the evidence may or may not support that allegation. Therefore, if Ms. Pernsteiner establishes a breach of the duty of fair representation regarding the April 2002 grievance, we remand the breach of contract claim to the Examiner for a hearing on the timeliness issue and, if appropriate, on the merits.

[2] The County also questions whether it is precluded by the Examiner's ruling from raising a timeliness defense related to the alleged failure of Duncan and/or OPEIU from processing the grievance in the timely manner. The merits of such a defense can be raised and litigated before the Examiner. His ruling was limited to application of the law to the facts pled in the complaint-facts which did not include any alleged failure to process the grievance in a timely manner.

gjc
33295-B