STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER DUNCAN

vs.

OZUAKEE COUNTY

Case 89
No. 70304
MP-4630

Decision No. 33295-E

Appearances:

Janet L. Heins, Heins Law Office LLC, 1001 West Glen Oaks Lane, Suite 101, Mequon, Wisconsin 53092, appearing on behalf of Peter Duncan.

Ronald S. Stadler, Gonzalez Saggio & Harlan LLP, 111 East Wisconsin Avenue, Suite 1000, Milwaukee, Wisconsin 53202, appearing on behalf of Ozaukee County.

FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

On November 1, 2010, Peter Duncan filed a complaint with the Wisconsin Employment Relations Commission alleging that Ozaukee County had violated a collective bargaining agreement by terminating his employment (and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a) 5 and 1, Stats.) and that the labor organization which served as his collective bargaining representative (Office and Professional Employees International Union, Local 35) had breached its duty of fair representation by failing to arbitrate grievances challenging his termination (and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(b) 1 and 4, Stats.).

Duncan subsequently settled his claim against OPEIU and that portion of his complaint was dismissed on June 26, 2012. Despite the settlement, it remained Duncan's obligation to establish that OPEIU had breached its duty of fair representation as a prerequisite to the Commission's exercise of jurisdiction over his breach of contract claim against the County.

Thus, on March 26, 2013, hearing was held in Port Washington, Wisconsin before Examiner Peter G. Davis as to the issue of whether OPEIU breached its duty of fair representation to Duncan. Duncan and Ozaukee County filed post-hearing written argument and the hearing transcript was received April 16, 2013. On April 29, 2013, I requested and subsequently received supplemental argument and the record was closed May 17, 2013.

Having reviewed the record, I make and issue the following

FINDINGS OF FACT

1. Ozaukee County, herein the County, is a municipal employer.

2. Office and Professional Employees International Union, Local 35, herein the Union, is a labor organization that served as the collective bargaining representative of certain County employees including Peter Duncan.

3. The County and the Union were parties to a collective bargaining agreement that contained a grievance procedure as well as a provision for final and binding arbitration of unresolved grievances.

4. Duncan's employment with the County ended in September 2009. Duncan asked Union representative Hainds to file contractual grievances regarding the end of Duncan's employment and to arbitrate those grievances if the County denied same. Hainds agreed to do so. Hainds filed grievances on Duncan's behalf. The County denied the grievances.

5. Duncan called Hainds on November 11, 2009 and April 23, 2010 to ask about the status of his arbitration case. Hainds advised Duncan that a request for arbitration of the grievances had been filed but that there would likely be a substantial delay before a hearing would occur. No such request was filed. No arbitration occurred.

Based on the above and foregoing Findings of Fact, I make and issue the following

CONCLUSION OF LAW

The conduct of Union representative Hainds as described in Findings of Fact 4 and 5 was arbitrary and OPEIU thereby breached its Sec. 111.70(2), Stats. duty of fair representation to Duncan.

Based on the above and foregoing Findings of Fact and Conclusion of Law, I make and issue the following

ORDER

I hereby assert the Commission's jurisdiction over Duncan's allegation that Ozaukee County violated a collective bargaining agreement by terminating his employment and thereby committed prohibited practices within the meaning of Secs.111.70(3)(a) 5 and 1, Stats.

Dated at Madison, Wisconsin, this 19th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/

Peter G. Davis, Examiner

OZAUKEE COUNTY (Peter Duncan)

MEMORANDUM ACCOMPANYING FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER

Until June 29, 2011, Sec. 111.70 (3)(a)5, Stats. provided that was a prohibited practice for a municipal employer (such as the County) to violate a collective bargaining agreement. However, if the collective bargaining agreement in question contained a final and binding impartial grievance arbitration procedure, the Commission would not asserts its jurisdiction over the Sec. 111.70(3)(a)5 claim (or the counterpart provisions found in Sec. 111.06(1)(f) of the Wisconsin Employment Peace Act and Sec. 111.84(1)(e) of the State Employment Labor Relations Act) because that contractual procedure was presumed to be the exclusive means by which alleged violations of those agreements could be resolved. Mahnke v. WERC, 66 Wis. 2D 524 (1974); Racine Educ. Ass'n. v. Racine Unified School Dist., 176 Wis. 2D 273 (Ct. App. 1993); Gray v. Marinette County, 200 Wis. 2D 426 (Ct. App. 1996); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERB, 5/55); Melrose-Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77); Monona Grove School District, Dec. No. 22414 (WERC, 3/85). However, if an employee covered by such a collective bargaining agreement could prove that his collective bargaining representative breached its statutory duty of fair representation by failing to arbitrate a grievance over an alleged violation of the agreement, then there was a sound policy basis which overcame the presumed exclusivity of the contractual grievance arbitration procedure. In such circumstances, the Commission would assert its prohibited practice/unfair labor practice jurisdiction to determine whether the agreement had been violated. Mahnke, *supra.*, Gray, *supra.*

Effective June 29, 2011, Sec. 111.70(3)(a) 5, Stats. was amended so as to only apply to collective bargaining agreements "affecting public safety employees or transit employees." Duncan is not a public safety employee or a transit employee. However, because the County's alleged violation of a collective agreement as to Duncan occurred in September 2009 (and his complaint was filed in November 2010), I think it clear that the June 29, 2011 statutory amendment does not end the Commission's right to exercise jurisdiction over Duncan's Sec. 111.70(3)(a) 5, Stats. claim if Duncan can establish a breach of the duty of fair representation by the Union.

As reflected in the prefatory paragraph that precedes the Findings of Fact, Duncan's complaint initially named both the Union and the County as Respondents but he subsequently settled the portion of his complaint against the Union. Based on that settlement, my predecessor in this matter (Examiner Carlson) dismissed the complaint as to the Union. Dec. No. 33295-C (Carlson, 6/12). However, as correctly noted by Examiner Carlson when citing the teachings of the United States Supreme Court in DelCostello v International Broth. Of Teamsters, 462 U.S. 151 (1983), Duncan's settlement of his claim against the Union does not alter his obligation to prove a breach of the duty of fair representation if I am to exercise the Commission's jurisdiction over his violation of contract claim against the County.

As noted earlier herein, necessary elements of Duncan's duty of fair representation case include the existence of a termination grievance and of a collective bargaining agreement that contained a provision for final and binding arbitration of such a grievance. The County points out that the record does not contain a grievance document or copy of a collective bargaining agreement. However, I am satisfied that the testimony of Duncan on direct and cross examination as to the existence of a termination grievance or grievances, a collective bargaining agreement and an arbitration process provides a sufficient evidentiary basis for a finding that these necessary elements are established by this record.

The merits of Duncan's duty of fair representation claim rest on the allegation that the Union agreed to arbitrate his grievance or grievances, failed to so do and then lied about its failure. The County argues that Duncan only presented hearsay evidence as to what Union representative Hainds told him, and thus that his claim must fail for lack of adequate proof. In support of this argument, the County contends that hearsay evidence is not admissible citing Secs. 908.02, Stats. and Sec. 111.07(3), Stats. which states in pertinent part that Commission complaint proceedings "shall be governed by the rules of evidence prevailing in courts of equity."

Duncan's testimony as to what Hainds told him is hearsay. However, through its administrative rules (see ERC 12.05 and 18.08(6)(c)), the Commission has concluded that "the rules of evidence and official notice provided in s. 227.45, Stats." apply in complaint proceedings and thus that "the examiner shall not be bound by common law or statutory rules of evidence." Thus, under the Commission's duly promulgated administrative rules, Duncan's hearsay testimony is admissible. Nonetheless, despite its admissibility, there remains the question of whether this hearsay testimony is sufficient to establish that Hainds told Duncan that the grievance(s) would be arbitrated and then subsequently lied. See Gehin v Wisconsin Group Ins. Bd., 278 Wis. 2d 111 (2005). In Gehin, the Court held that uncorroborated hearsay alone (that is controverted by in-person testimony) does not provide a sufficient basis for a finding of fact. Here, Duncan's uncorroborated hearsay as to Hainds' remarks was not controverted by any in-person testimony. Thus, as I understand Gehin, Duncan's hearsay testimony can be a sufficient basis for a factual finding. Because I find Duncan's hearsay testimony to be credible, I have made Findings of Fact 4 and 5 reflecting the Union's agreement to arbitrate the grievance(s) and Hainds subsequent lies which sought to cover up the failure to honor that agreement.

Turning to the question of whether Hainds' conduct breached the Union's duty of fair representation, both parties correctly agree that this question is answered by determining whether to the Union's conduct was "arbitrary, discriminatory or in bad faith." However, as the Court recently noted in SEIU v WERC, 329 Wis. 2d 447 (Ct. App. 2010) there are separate proof standards that apply depending on whether union conduct is asserted to be "arbitrary" or "discriminatory or in bad faith". The Court pointed out that "Whether a union acted arbitrarily 'requires inquiry into the objective adequacy of union action'" while "whether a union's conduct was discriminatory or in bad faith 'requires inquiry into the subjective motivation behind union action'."

These differing standards of proof make it important to determine whether Duncan's breach of the duty of fair representation allegation is based on alleged "arbitrary" conduct, or on alleged "discriminatory/bad faith" conduct, or both. Duncan's complaint only cites the statutory provision which is violated by a breach of the duty of fair representation (Sec. 111.70(3)(b)1, Stats.) and thus covers both the "arbitrary" and "discriminatory or in bad faith" theories. At the beginning of the hearing, I generally stated my understanding of the issue to be tried as "whether OPEIU Local 35 breached its duty of fair representation" and thus both theories continued to be viable. Neither party made an opening statement thereafter. Duncan's closing statement at hearing references "arbitrariness and bad faith".

Given the foregoing, I am satisfied (and the County does not argue otherwise) that the County was on notice and had the opportunity to defend against both an "arbitrary" and a "bad faith" attack on the OPEIU's conduct. Thus, from a due process perspective, both theories could properly be pursued by Duncan in post-hearing argument. See Racine Unified School District, Dec. No. 20941-B (WERC, 1/85); General Electric v WERB, 3 Wis. 2d 227 (1958).

Duncan's post-hearing brief argues only "bad faith". Confronted with the foregoing, I asked the parties to address the question of whether the "arbitrary" conduct theory was properly before me. In response, the County argued that Duncan has waived the right to have the "arbitrary" theory considered. Duncan did not address the waiver issue but instead amended the original brief to include an "arbitrary" theory argument. Although it is a close question, I am persuaded that the "arbitrary" theory is properly before me. Waiver is commonly understood to be an intentional relinquishment of a known right. Preston v Meriter Hosp., Inc., 284 Wis. 2d 264 (2005). Here, the known right was to pursue the "arbitrary" theory and I conclude its absence from Duncan's first brief was sloppy but inadvertent rather than intentional.

Bad Faith Theory

Here, there is no evidence as to why Hainds acted as he did. Thus, there is no proof of improper motive. Therefore, applying the above discussed "bad faith" proof requirements established by the Court in SEIU, I cannot find that the Union acted in "bad faith" and thereby breached its duty of fair representation.

Arbitrary Theory

In Coleman v. Outboard Marine Corp., 92 Wis. 2d 565 (1979), the Wisconsin Supreme Court adopted a standard borrowed from federal duty of fair representation law to the effect that intentional union failure to advise an employee as to whether the union would or would not arbitrate a termination grievance can establish an "arbitrary" breach of the duty of fair representation. The Court further held than even an unintentional failure can be "so egregious, so far short of the minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary." Coleman at 580.

Duncan's "arbitrary" conduct theory rests on the premise that OPEIU representative Hainds agreed to arbitrate Duncan's termination grievances, did not do so and subsequently lied to Duncan on two occasions to the effect that an arbitration request had in fact been filed. The County suggests several benign interpretations of Hainds' comments to Duncan. It asserts that without testimony from Hainds that would warrant rejection of these alternative interpretations, Duncan cannot meet his burden of proof as to arbitrary Union conduct. I disagree.

The County is correct that Duncan has the burden of proof. However, applying the Coleman standards, I am persuaded that Duncan has in effect established a *prima facie* case of a breach of the duty of fair representation. I am hard pressed to conclude anything other than that Hainds intentionally misled Duncan as to the filing of an arbitration case. His statements to Duncan were untrue and accompanying by false explanations as to why no arbitration date had been scheduled. Even under the lesser "unintentional" conduct Coleman standard, a finding of arbitrary conduct would be warranted. In my view, contrary to the County, Duncan had no obligation to produce Hainds as a witness and thereby potentially compromise his case. In normal circumstances, the Union would still be a party to the case and would call such a witness when defending itself. However, here, the Union is no longer a party. Thus, it fell to Duncan and the County to decide whether to call Hainds as a witness. Neither was compelled to do so and neither chose to do so. Thus, Duncan's *prima facie* case stands unrebutted and establishes an "arbitrary" breach of the duty of fair representation.

Based on the breach and consistent with the law discussed earlier herein, I am exercising the Commission's jurisdiction over Duncan's violation of contract claim.

Dated at Madison, Wisconsin, this 19th day of June, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis /s/
Peter G. Davis, Examiner

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