STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TEAMSTERS LOCAL NO. 662, Complainant,

vs.

NEW RICHMOND SCHOOL DISTRICT, Respondent.

Case 71
No. 71206
MP-4692

Decision No. 33799-A

and

Case 72
No. 71251
MP-4696

Decision No. 33800-A

Appearances:

Kyle A. McCoy, Soldon Law Firm LLC, Attorneys at Law, 6319 29th Avenue N.W., Rochester, Minnesota, appears on behalf of Complainant.

Michael J. Waldspurger, Ratwik, Roszak & Maloney, P.A., Attorneys at Law, 730 Second Avenue South, Minneapolis, Minnesota, appears on behalf of the Respondent.

ORDER PARTIALLY GRANTING MOTION TO DISMISS AND DENYING MOTION TO DISMISS IN OTHER RESPECTS

On October 31, 2011, Teamsters Local 662 (Complainant), filed a complaint (Case 71) of prohibited practices against the New Richmond School District (Respondent) with the Wisconsin Employment Relations Commission (Commission) in which it alleged that on September 4, 2011 it held an investigatory meeting involving Union Steward Becky Larson in which it failed to accord her a union representative and on September 13, 2011, threatened to use video tape evidence to discipline Gene Mierau and David Veilleux effectively on the basis that they were adherents of Complainant, all in violation of Section 111.70 (3)(a)1 and 3, Stats and constitutional rights.[1] The complaint seeks an

[1] It also alleges that Respondent's actions against Larson violate a right granted in the Employer's handbook.

order rescinding any and all discipline issued to Becky Larson, Gene Mierau, or David Veilleux and directing Respondent to cease and desist from interfering with protected rights. The Commission assigned Steve Morrison, a member of its staff, as Examiner, to hear said complaint.

On December 5, 2011, Complainant filed another complaint (Case 72) against Respondent in which it alleged that Respondent had on October 2, 2011 discharged Gene Mierau and David Veilleux on the basis that they were adherents of the Complainant, in violation of Section 111.70(3)(a)1 and 3, Stats and various other federal and state laws. The complaint seeks the same remedy as in Case 71. On February 29, 2012, the Commission appointed Stanley H. Michelstetter II, a member of its staff, as Examiner in Cases 71 and 72.

The Examiner held a telephonic pre-hearing conference on February 3, 2012 during the course of which the parties agreed to consolidate the two cases. On February 10, 2012, Respondent filed a motion to dismiss cases 71 and 72 together with its arguments in support thereof. Complainant responded thereto on February 14, 2012.

NOW, THEREFORE, it is

ORDERED

1. The motion to dismiss the allegations of the complaints as to a violation of the Employer's handbook, unspecified federal (including Constitutional) laws and state law rights outside Sec. 111.70, Stats. are dismissed.

2. The motion to dismiss filed by Respondent is denied in every other respect with leave to renew its motion as to deferral to a procedure established under Sec. 66.0509(1m), Stats.at hearing to be addressed in the final arguments.

Dated at Madison, Wisconsin, this 29th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/
Stanley H. Michelstetter II, Examiner

NEW RICHMOND SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER DENYING MOTIONS

POSITIONS ON MOTION

The Respondent takes the position that the complaints should be dismissed for the following reasons:

1. Complainant is not a "party in interest" within the meaning of Sec. 111.07(2)(a), Stats, because Complainant was decertified under Sec. 111.70(4)(d)3b, Stats, and is barred from representing Respondent's custodial employees for collective bargaining purposes by Sec. 111.70(4)(d)3b, Stats.

2. Complainant's claims seeking a prospective order prohibiting Respondent from interfering with, retaliating against, and/or discouraging membership through discrimination are moot.

3. The Commission lacks authority to adjudicate the complaint because under Sec. 66.0509(1m), Stats, the Employer's grievance process is the exclusive forum for contesting employee discipline.

4. Respondent did not violate Complainant's *Weingarten*[2] right as a matter of law.

5. The Commission lacks jurisdiction to rule whether Respondent violated its handbook.

6. As a matter of law Respondent may use surveillance cameras to monitor work performance.

7. The Commission lacks jurisdiction over the unspecified state, federal and "constitutional" claims stated in the complaint.

The Complainant responds that it is a "party in interest" because it was the exclusive representative of the individuals involved at the time of their termination. To the extent that Respondent's positions are based on the fact that Complainant is decertified, that fact does not prohibit Complainant from seeking to have the Commission require Respondent to follow the law. Complainant's factual allegations as Respondent's violation as to unspecified state, federal (including Constitutional), and of the Employer's handbook and the Employer's use of surveillance cameras are stated only as evidence of improper motivation.

[2] Rights to Union representation in investigations leading to discipline are commonly referred to by reference to NLRB. V. WEINGARTEN, 420 U.S. 251, 267 (1975).

DISCUSSION

Motion practice in prohibited practice proceedings is very limited. The Commission's standard of review for motions to dismiss is set forth in Wis. Admin. Code §ERC 12.04(1)(f) which states:

> (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 facts alleged that would make dismissal inappropriate.

I first address Respondent's argument that Complainant is not a "party in interest." Section 111.70(4), provides that the procedure for processing complaints under MERA shall be those specified in Sec. 111.07, Stats. Section 111.07(2), Stats, provides that the Commission has jurisdiction over a "party in interest." Section 111.07(2), Stats, provides in relevant part: [3]

> **(a)** Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of such complaint to all other parties in interest. Any other person claiming interest in the dispute or controversy, as an employer, an employee, or their representative, shall be made a party upon application. . . . .

The Commission has a long-standing policy of interpreting a "party in interest" as the concept applies to a labor organization to require that the labor organization must be (1) authorized by the employees involved to represent them for purposes of collective bargaining, or (2) said organization or 'person' claims to represent those employees for the purpose of collective bargaining, or (3) said labor organization or "person" may be the "representative" authorized by an employee or employees to seek legal redress with respect to an alleged unfair labor practice affecting such employees. See, GEROVAC WRECKING CO, INC., 8334 (WERC, 12/67), aff'd. sub nom. CHAUFFEURS, TEAMSTERS & HELPERS V. WERC, 51 Wis.2d 391, 402 (1971), SURFSIDE MANOR, WERC Dec. No. 11809 (WERC, 5/73) p. 11, Aff'd. sub nom HOSPITAL AND SERVICE EMPLOYEES INTERNATIONAL UNION, LOCAL 150, AFL-CIO V. WERC, Case No. 410-309 (4/74)

The gravamen of this complaint is the alleged discharge of three union-adherents. The complaint alleges that Complainant was the certified representative of the bargaining unit involved at the time in dispute, was seeking recertification, and, viewing the complaint most favorably to Complainant, represents the individuals involved. I conclude that Complainant is a party in interest.

I next address Respondent's position that Complainant's claims seeking a prospective order prohibiting Respondent from interfering with, retaliating against, and/or discouraging membership through discrimination is moot. In MANITOWOC PUBLIC SCHOOL DISTRICT, WERC DEC. NO. 30276-A (2/02), aff'd. as a matter of law DEC. NO. 30276-B (WERC, 3/02), Examiner Nielsen held that an

[3] See, Wis. Admin. Code, Sec. ERC 12.02(1)

allegation over a refusal to provide information for bargaining was moot when the information requested to assist in bargaining for a new agreement was provided after the complaint was filed and the parties ultimately entered into a new collective bargaining agreement because a judgment on the matter could have "no practical legal effect." The decision was affirmed as a matter of law. While Act 10 greatly restricted the process of collective bargaining for general public employees, it very carefully preserved the right of public employees to belong to labor organizations and to advocate for them. If the allegations are proved, the Commission has authority to impose its ordinary remedies and to order that the Employer cease and desist from further such violations. The Complaint is not moot.

Respondent now essentially argues that the complaint should be dismissed because the individual employees failed to avail themselves of the Employer's unilaterally adopted grievance process under Sec. 66.0509(1m), Stats, and because that process is the exclusive process for the resolution of employee complaints about discipline. Respondent incorrectly states the Commission's standards for deferral. While the Commission has a long standing policy of refusing to assert its authority to adjudicate claims of violation of a collective bargaining agreement where the complaining party has failed to pursue a grievance through a collectively bargained grievance procedure, it does not routinely do so in cases in which allegations are made under Sec. 111.70(3)(a)1 and 3, Stats. See, COUNTY OF DOOR, WERC DEC. NO. 31281-F (Michelstetter, 9/08). In cases under Sec. 111.70(3)(a)1 and 3, the WERC will consider deferring allegations to collectively bargained grievance arbitration where, among other standards, the parties agree to arbitrate the dispute and the dispute does not involve important issues of law or policy. See, PULASKI SCHOOL DISTRICT, WERC DEC. NO. 33037-A (Emery, 7/10), reversed in part, WERC DEC. NO. 33037-A (WERC, 1/10). This situation does not meet those standards.

The Commission has not addressed the interrelationship of local grievance procedures now required under Sec. 66.0509(1m), Stats. Section 66.0509(1m), provides:

> 66.0509(1m)
>
> **(a)** A local governmental unit, as defined in s. 66.0131 (1) (a), that does not have a civil service system on June 29, 2011, shall establish a grievance system not later than October 1, 2011.
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> **(b)** To comply with the grievance system that is required under par. (a), a local governmental unit may establish either a civil service system under any provision authorized by law, to the greatest extent practicable, if no specific provision for the creation of a civil service system applies to that local governmental unit, or establish a grievance procedure as described under par. (d).
>
> **(c)** Any civil service system that is established under any provision of law, and any grievance procedure that is created under this subsection, shall contain at least all of the following provisions:
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> **1.** A grievance procedure that addresses employee terminations.
> **2.** Employee discipline.
> **3.** Workplace safety.

> **(d)** If a local governmental unit creates a grievance procedure under this subsection, the procedure shall contain at least all of the following elements:
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> 1. A written document specifying the process that a grievant and an employer must follow.
> 2. A hearing before an impartial hearing officer.
> 3. An appeal process in which the highest level of appeal is the governing body of the local governmental unit.
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> **(e)** If an employee of a local governmental unit is covered by a civil service system on June 29, 2011, and if that system contains provisions that address the provisions specified in par. (c), the provisions that apply to the employee under his or her existing civil service system continue to apply to that employee.

This provision sets minimum standards for local procedures and does not on its face require that they be exclusive. The motion for pre-hearing deferral is properly denied with leave to renew the argument in final briefs.

Complainant has conceded that the Commission does not have direct jurisdiction over its unspecified federal and state law violations, or over the enforcement of the Employer's handbook. The motion to dismiss as to those claims is granted. If evidence or argument as to those claims is relevant to the issues properly before the Commission, they will be addressed as appropriate. The Commission has jurisdiction to hear the complaint as to the use of any form for a reason proscribed by Sec. 111.70, Stats. See, HILLVIEW NURSING HOME, LA CROSSE COUNTY, WERC DEC. NO. 14704-A (McGilligan, 7/77). Accordingly, the Complaint is dismissed as to its allegations over unspecified federal (including Constitutional) violations, violations of state law outside Sec. 111.70, Stats, and violations of Respondent's handbook. The motion to dismiss is denied in all other respects.

Dated at Madison, Wisconsin, this 29th day of February, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Stanley H. Michelstetter II /s/

Stanley H. Michelstetter II, Examiner

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