STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

STEVENS POINT EDUCATIONAL ASSISTANTS ASSOCIATION, Complainant,

vs.

STEVENS POINT AREA PUBLIC SCHOOL DISTRICT, Respondent.

Case 99
No. 71537
MP-4707

Decision No. 33905-A

Appearances:

Attorney Stephen Pieroni, Wisconsin Education Association Council, 33 Nob Hill Road, P.O. Box 8003, Madison, Wisconsin 53708-8003, appearing on behalf of the Stevens Point Educational Assistants Association.

Attorney Michael Cieslewicz, Kasdorf, Lewis & Swietlik, One Park Plaza, 11270 West Park Place, Fifth Floor, Milwaukee, Wisconsin 53224, appearing on behalf of the Stevens Point Area Public School District.

ORDER GRANTING IN PART, AND DENYING IN PART, MOTION TO DISMISS

On February 20, 2012, Complainant Stevens Point Educational Assistants Association ("SPEAA" or "Union") filed a Prohibited Practices Complaint with the Wisconsin Employment Relations Commission, alleging that Respondent Stevens Point Area Public School District ("District") had committed prohibited practices related to the termination of Vicki Okray's employment with the District as an Office Assistant at Plover-Whiting Elementary School. On June 28, 2012, the District filed an Answer and Affirmative Defenses. On July 11, 2012, the District moved to dismiss the complaint and supported its motion with written argument. A briefing schedule was set, at the conclusion of which the undersigned Examiner engaged in email correspondence with Complainant's counsel to clarify further the Union's position as argued in its brief in opposition to the motion. The last such email was received by the Examiner from Complainant's counsel on August 27, 2012. Having considered the motion to dismiss, as well as the arguments of the parties, the Examiner issues the following

ORDER

The District's motion to dismiss the complaint is hereby granted in part and denied in part. The motion is granted as to SPEAA's claim under Sec. 111.70(3)(a)4, Stats., that the District failed to bargain in good faith by unilaterally changing working conditions by discharging Ms. Okray without just cause. However, the District's motion to dismiss is denied as to SPEAA's claim that the District failed to submit the grievance to binding arbitration in violation of Sec. 111.70(3)(a)5, Stats.

Dated at Madison, Wisconsin, this 26th day of September, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Examiner

STEVENS POINT AREA PUBLIC SCHOOL DISTRICT

MEMORANDUM ACCOMPANYING ORDER GRANTING IN PART, AND DENYING IN PART, MOTION TO DISMISS

UNDISPUTED FACTS

The following facts are based on the pleadings viewed in the light most favorable to the Complainant, and are undisputed for the purpose of deciding the instant motion.[1] Vicki Okray's employment with the District as an Office Assistant at Plover-Whiting Elementary School was terminated, effective February 23, 2011. On or about that date, the Union filed a grievance alleging that Ms. Okray was discharged without just cause in violation of Article 8, paragraph F, of the parties' collective bargaining agreement ("CBA" or "Agreement"). Article 21-Duration provides:

> The provisions of the Agreement shall be effective as of July 1, 2008, and shall remain binding through June 30, 2010. This Agreement shall automatically be renewed and shall continue binding for additional periods of one year unless either the Board or the Association gives written notice to the other not later than June 1, 2010, of its desire to reopen this Agreement.

Neither the Association nor the Board provided written notice to reopen the Agreement prior to June 1, 2010. On April 12, 2011, the Administration denied the grievance. Subsequently, the grievance was submitted to the Board of Education. On July 12, 2011, the Board of Education notified the Association that the Board denied the grievance by a vote of 6-3. On July 25, 2011, the Union requested arbitration of the grievance pursuant to the contractual grievance procedure. In correspondence dated July 25, 2011, Respondent asserted that the grievance was not subject to binding arbitration and refused to process the grievance to arbitration.

ANALYSIS

The gravamen of the Union's complaint is that the Respondent "failed to bargain in good faith by unilaterally changing working conditions by discharging Ms. Okray without just cause and by failing to submit the grievance to binding arbitration in violation of Wis. Stats. §§ 111.70(3)(a)4 and 5." (Compl. ¶ 11.) The District offers three arguments to support its motion to dismiss: 1) because SPEAA did not recertify, it was legally no longer in existence and thus

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[1] *See* Sec. ERC 12.04(2)(f), Wis. Adm. Code (stating in relevant part, "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.") Moreover, the District submitted other materials with its motion and brief, including a copy of the CBA. Because the Union did not contest the authenticity of this copy, and because the Union's Complaint refers to the CBA, I consider portions of the CBA where appropriate. However, I find it unnecessary to consider other materials beyond the scope of the pleadings submitted by the District.

lacked standing to prosecute this case; 2) Act 10, which was in effect when the grievance was brought before the School Board in mid-July, 2011, prohibits arbitration beyond the School Board level; therefore, Act 10 bars arbitration; and 3) even if the CBA were in effect, the grievance is not arbitrable, because SPEAA failed to comply with the two-week time limit for appealing the grievance to the superintendent. I address these arguments in sequence below.

I. WHETHER SPEAA IS A PROPER PARTY, ABSENT RECERTIFICATION

The District asserts that the Union failed to recertify timely as a municipal labor organization after June 30, 2011, the date, according to the District, that Act 10 became effective. Thus, the District argues, SPEAA ceased to exist on that date and therefore lacked standing to bring this complaint. I disagree with the District's premises and conclusions.

First, Acts 10 and 32 became effective for purposes of this action "on the day on which the agreement expire[d]": July 1, 2011. Although Act 10 *generally* became effective on June 29, 2011, and Act 32 generally became effective on July 1, 2011, both Acts contain language that qualifies when the Acts become effective in situations where, as here, sections of the Acts conflict with provisions of collective bargaining agreements. The Acts state in relevant part that the "treatment of sections . . . 111.70(3)(a)4., 5. [by Act 10] and 111.70(3)(a)5. [by Act 32] . . . first appl[y] to employees who are covered by a collective bargaining agreement under subchapter IV of chapter 111 of the statutes that contains provisions inconsistent with those sections on the day on which the agreement expires or is terminated, extended, modified, or renewed, whichever occurs first." The underlying rights in the CBA herein alleged to be infringed, namely, termination only for just cause and the right to arbitrate any alleged infringement of that right, conflict with the more restricted definition of "collective bargaining" in Sec. 111.70(1)(a), Stats., as amended by Acts 10 and 32. More specifically, the definition in the amended statute includes "resolv[ing] questions arising under [a collective bargaining] agreement," but only "with respect to wages for general municipal employees". Because the CBA herein contains provisions inconsistent with the statute as amended, and because the CBA remained binding *through* June 30, 2011, Acts 10 and 32 became effective for purposes of this action "on the day on which the agreement expire[d]": July 1, 2011.

Furthermore, while SPEAA admits that it did not recertify as the exclusive bargaining representative of the bargaining unit, the District's conclusion that SPEAA therefore ceased to exist altogether as of June 30, 2012, is invalid. On October 3, 2011, SPEAA filed a petition with the Commission, "requesting that the Commission conduct an initial annual certification election to determine whether certain employees of the Stevens Point Area Public Schools wanted to continue to be represented for the purposes of collective bargaining by the Association." Stevens Point Area Public Schools, Dec. No. 33831 (WERC, 3/12). The Commission dismissed SPEAA's election petition and further ordered:

> Pursuant to ERC 71.03(7)(b), the Stevens Point Educational Assistants Association ceased to be the collective bargaining representative of certain

> employees of the Stevens Point Area Public Schools as of 4:31 p.m. on September 30, 2011 and said employees shall not be included in a substantially similar bargaining unit for at least one year following September 30, 2011.

Id. That SPEAA "ceased to be the collective bargaining representative of certain employees . . . on September 30, 2011", is not, however, tantamount to SPEAA's nonexistence altogether. While the legal status and scope of authority enjoyed by SPEAA prior to September 30, 2011, changed, the District offers no proof that SPEAA no longer exists, and SPEAA's pursuit of this suit is evidence to the contrary. *See, e.g.,* Brickley v. Neuling, 256 Wis. 334, 336, 41 N.W.2d 284, 285 (1950) (noting that it is not merely elementary but more accurately "fantastic" to suggest that a deceased party can be a party to an action.)

The District's reliance on Combes v. Keyes, 89 Wis. 297 (1895), a case in which the Supreme Court set aside an order authorizing service of a summons by publication on a corporation that had surrendered its charter, is misplaced. Even assuming *arguendo* that a corporation is sufficiently analogous to a labor organization, the defendant corporation in Combes, unlike SPEAA, had truly ceased to exist when it was served. Service by publication on the defunct corporation did not alchemize its grave sheets into swaddling clothes; rather, a former secretary of the corporation intervened to show that the corporate charter had been surrendered. By contrast, although SPEAA's powers have been diminished by its lack of recertification and by the substantive provisions of Acts 10 and 32, SPEAA continues to exist, as evidenced by its filing this action.

The real question is thus whether the change in SPEAA's legal status (*i.e.* the cessation of its "exclusive representative status" under ERC 71.03(7), Wis. Adm. Code), somehow precludes SPEAA from being a proper party to this action. Resolving this broad question, in turn, requires the resolution of two issues: 1) whether SPEAA is a "party in interest" that may bring an action under MERA, and 2) whether SPEAA has standing to file suit. The former issue is one of subject matter jurisdiction, Chauffeurs, Teamsters and Helpers "General" Union, Local No. 200 v. Wisconsin Employment Relations Commission, 51 Wis. 2d 391, 403, 187 N.W.2d 364 (1971), while the latter is one of judicial (or quasi-judicial) policy. Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc., 2011 WI 36, 333 Wis. 2d 402, 797 N.W.2d 789. I address these issues respectively.

A. Whether SPEAA is a "Party in Interest"

Although the parties debate whether SPEAA is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats., that question is not dispositive of whether SPEAA may bring this action. In Surfside Manor and Hospital and Service Employees' International Union, Local 150, Dec. Nos. 15267 and 15268 (WERC, 5/73), a case involving application of the Wisconsin Employment Peace Act (WEPA), the Commission clarified,

> "the issue as to whether [a Union] is a proper party complainant does not rise or fall on whether [the union] is a labor organization. Sec. 111.07(2)(a) requires that complaints of unfair labor practices be filed by "any party in interest. . . ."

Though brought under WEPA, the Surfside case is instructive here, because pursuant to Sec. 111.70(4)(a), Stats., "Sec. 111.07 shall govern procedure in all cases involving prohibited practices . . . ." Accordingly, because only a "party in interest" within the meaning of Sec. 111.07(2)(a), Stats., may bring an action under MERA, the issue is whether SPEAA is such a party, not whether it is a "Labor organization."

Although the parties did not specifically address this issue, I may do so. The Wisconsin Supreme Court has determined that whether a party is a "party in interest" within the meaning of Sec. 111.07(2)(a), Stats., is a question of subject matter jurisdiction. Chauffeurs, Teamsters and Helpers "General'' Union, Local No. 200 v. Wisconsin Employment Relations Commission, 51 Wis. 2d 391, 397, 403, 187 N.W.2d 364, 366 (Wis. 1971). The Court also has observed, "jurisdiction is always a proper question to consider even if we raise it *sua sponte*." Milwaukee County v. Caldwell, 31 Wis. 2d 286, 289, 143 N.W.2d 41, 42 (1966), *citing* Yaeger v. Fenske, (1962), 15 Wis. 2d 572, 573, 113 N.W.2d 411. I believe that the same principle applies to quasi-judicial proceedings before administrative agencies such as the Commission. *See, e.g.,* Runstrom v. Alaska Native Medical Center, 280 P.3d 567, 573, n. 16 (Alaska, 2012), *citing* Monzulla v. Voorhees Concrete Cutting, 254 P.3d 341, 344 (Alaska 2011) ("There are some issues that a court *or administrative agency* should raise on its own, such as subject matter jurisdiction") (emphasis added).

Because the term, "party in interest," is not defined in MERA or WEPA and the term has a legal meaning, resort to Black's Law Dictionary is appropriate. *See, e.g.,* Apartment Ass'n of South Cent. Wisconsin, Inc. v. City of Madison, 2006 WI App 192, ¶ 23, 296 Wis. 2d 173, 190, 722 N.W.2d 614, 622, *citing* State v. Ellis H., 2004 WI App 123, ¶ 15, 274 Wis. 2d 703, 684 N.W.2d 157 ("When words have a legal meaning, it is appropriate to consult Black's Law Dictionary."); Madison Teachers, Inc. v. Madison Metropolitan School Dist., 197 Wis. 2d 731, 749, 541 N.W.2d 786, 793 (Ct. App. 1995) (observing that Black's Law Dictionary is an "an accepted law dictionary" in the context of the Court's construction of a section of MERA.); State ex rel. Cincinnati Ins. Co. v. Circuit Court for Milwaukee County, 2003 WI 57, ¶ 18, n. 16, 262 Wis. 2d 99, 110, 663 N.W.2d 275, 280 (recognizing that the Supreme Court "took guidance from Black's Law Dictionary" regarding the meaning of parties "united in interest".); Miller Brewing Co. v. Labor and Industry Review Com'n, 173 Wis. 2d 700, 714, 495 N.W.2d 660, 665 (1993) (noting that "Black's Law Dictionary can be used to define 'adverse party' in sec. 102.23(1)(a)", a statute governing judicial review of LIRC's worker's compensation decisions.); Matter of Wisconsin Sur. Corp., 112 Wis. 2d 396, 404, 332 N.W.2d 860, 864 (Ct. App. 1983) (resorting to Black's Law Dictionary to define "third party", where the term was "not defined in ch. 645.").

I thus turn to *Black's Law Dictionary* (9th ed. 2009), for guidance on the meaning of the term. Recognizing that the term, "party in interest", is synonymous with the term, "real party in interest", *Black's* defines both as follows:

> ***real party in interest.*** (1804) A person entitled under the substantive law to enforce the right sued upon and who generally, but not necessarily, benefits from the action's final outcome. – Also termed *party in interest*; (archaically) *interessee*....[2]

I apply this definition to determine whether SPEAA is a party in interest as to its claims under Secs. 111.70(3)(a)4 and 5, Stats., respectively.

1. SPEAA's Claim Under Sec. 111.70(3)(a)4, Stats.

Assuming for now that a claim under Sec. 111.70(3)(a)4, Stats., is cognizable,[3] SPEAA is the party expressly "entitled under the substantive law to enforce the right sued upon", and, as such, is a party in interest regarding this claim. As noted, SPEAA alleges in part that the Respondent "failed to bargain in good faith by unilaterally changing working conditions by discharging Ms. Okray without just cause". (Compl. ¶ 11.) The relevant substantive law regarding this claim, Sec. 111.70(3)(a)4, Stats., provides in pertinent part:

> **(3)** Prohibited practices and their prevention. (a) It is a prohibited practice for a municipal employer individually or in concert with others: . . .
>
> 4. To refuse to bargain collectively *with a representative of a majority of its employees* in an appropriate collective bargaining unit. . .

(Emphasis added.) SPEAA's refusal-to-bargain claim under Sec. 111.70(3)(a)4, Stats., is based on an alleged unilateral change in working conditions when the District allegedly terminated Ms. Okray's employment without just cause. Thus, the dispute under Sec. 111.70(3)(a)4, Stats., arose no later than February 23, 2011, the effective date of Ms. Okray's termination (and the District's alleged unilateral change), but prior to the expiration of the CBA on July 1, 2011. Accordingly, this dispute arose while SPEAA was still 1) the majority representative of the bargaining unit, and, as such, the party with which the District

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[2] A comment to the definition further clarifies that the "'real party in interest' is the party who, by the substantive law, *possesses the right sought to be enforced*, and not necessarily the person who will ultimately benefit from the recovery...." (Emphasis added.)

[3] As discussed further below, although I conclude that SPEAA is a party in interest as to its claim under Sec. 111.70(3)(a)4, Stats., and that therefore the Commission has jurisdiction to consider it, the claim ultimately must fail as a matter of law. A refusal-to-bargain claim is not cognizable where, as here, the alleged duty to bargain concerns a mandatory subject of bargaining "already covered by the contract." School District of Cadott Community, Dec. No. 27775-C (WERC, 6/94), *aff'd.* by Cadott Educ. Ass'n v. Wisconsin Employment Relations Com'n, 197 Wis. 2d 46, 540 N.W.2d 21 (Ct. App. 1995).

had a duty to bargain under Sec. 111.70(3)(a)4, Stats., and thus 2) the party "entitled under the substantive law to enforce the right sued upon" (termination without just cause as a unilateral change) *Black's Law Dictionary,* (9th ed. 2009). Therefore, SPEAA is a party in interest as to its claim under Sec. 111.70(3)(a)4, Stats.

I conclude as much even though, when the Complaint was filed, the Union had lost its exclusive representative status and Acts 10 and 32 had become effective. SPEAA still existed when the Complaint was filed. Moreover, the treatment in Acts 10 and 32 of various sections of MERA expressly first applies to employees covered by a collective bargaining agreement containing provisions inconsistent with those sections of MERA, on the day on which the agreement "expires or is terminated, extended, modified, or renewed, whichever occurs first." Act 10, Sec. 9332, Act 32, Sec. 9332(1)(q). Conditioning the effective date of Acts 10 and 32 on the expiration of existing bargaining agreements in this manner suggests a legislative intent not to apply the Acts retroactively so as to impair existing contract rights, such as the right not to be fired without just cause.[4] Although the Union styles its claim as arising under statute rather than contract, the Legislature, through its structuring of the effective date of Acts 10 and 32 to safeguard rights arising under agreements that preceded the Acts, did not intend to infringe the very right the Union seeks to enforce herein for purposes of determining whether it is a party in interest (termination only for just cause).

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[4] This legislative intent also accords with the limitations on retroactive application of statutes. According to the Wisconsin Supreme Court:

> . . . Generally, statutes are applied prospectively. Snopek v. Lakeland Med. Ctr., 223 Wis. 2d 288, 293, 588 N.W.2d 19 (1999).
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> There are, however, exceptions to this general rule. A statute may be applied retroactively if: 1) by express language or by necessary implication, the statutory language reveals legislative intent that it apply retroactively, or 2) the statute is remedial or procedural rather than substantive. If a statute falls under the second exception—that is, it is remedial or procedural—it nonetheless cannot be applied retroactively if the legislature clearly expressed its intent that it be applied prospectively only, or retroactive application would impair contracts or vested rights.
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> *Id.* at 294, 588 N.W.2d 19 (citations omitted).
>
> The difference between a substantive statute and a procedural statute is clear. A statute is substantive if it creates, defines or regulates rights or obligations. Betthauser v. Medical Protective Co., 172 Wis. 2d 141, 147–48, 493 N.W.2d 40 (1992). Remedial or procedural statutes are "those which afford a remedy, or improve or facilitate remedies already existing for the enforcement of rights and redress of injuries." Chappy v. LIRC, 128 Wis. 2d 318, 324, 381 N.W.2d 552 (Ct. App. 1985) (citation omitted).

Rock Tenn Co. v. Labor and Industry Review Com'n, 2011 WI App 93, ¶¶ 13-14, 334 Wis. 2d 750, 758-759, 799 N.W.2d 904, 908. Because they define and regulate obligations, Acts 10 and 32 are substantive and are therefore to be applied prospectively. Moreover, even if these Acts were interpreted to be remedial or procedural, they could not be applied retroactively if doing so would impair existing contract rights.

While the distinction between statutory and contractual claims does not preclude SPEAA from being a party in interest as to its claim under Sec. 111.70(3)(a)4, Stats., the Union's effort to clothe its essentially contractual, just-cause claim in the garb of a refusal-to-bargain theory ultimately fails to meet the dress code of cognizability: under Sec. 111.70(3)(a)4, Stats., "a municipal employer's duty to bargain during the term of a contract extends to all mandatory subjects of bargaining *except those which are covered by the contract* or as to which the union has waived its right to bargain through bargaining history or specific contract language." School District of Cadott Community, Dec. No. 27775-C (WERC, 6/94) (emphasis added), *aff'd.* by Cadott Educ. Ass'n v. Wisconsin Employment Relations Com'n, 197 Wis. 2d 46, 540 N.W.2d 21 (Ct. App. 1995) (concluding that "if the parties' agreement addresses the issue of holiday pay, there is no violation of the duty to bargain imposed by § 111.70(3)(a) 4, Stats.)

Here, the Union's allegation of refusal to bargain and unilateral change is based on the alleged termination of Ms. Okray without just cause, a subject of bargaining more clearly covered by the contract than that at issue in School District of Cadott Community. In the latter case, the Union contested eligibility requirements for holiday pay that it alleged were a mandatory subject of bargaining unilaterally imposed by the school district in violation of Sec. 111.70(3)(a)4, Stats. The contract provision primarily at issue merely stated, "Paid holidays in the school calendar will be Memorial Day, Thanksgiving and Labor Day." The Commission nevertheless reasoned:

> *Although the parties did not specifically discuss the eligibility issue at the heart of the instant dispute*, they do have a holiday pay provision. That provision, when read in conjunction with the rest of the contract, defines employes' holiday pay rights. As was true in Janesville, *that conclusion ends the inquiry we need to make to resolve the duty to bargain issue*. The parties have bargained on holiday pay and are not obligated to bargain further on the issue. The scope of the parties' rights under their bargain need not be defined here and are appropriately left to the grievance arbitration process.

Id. (emphasis added). This reasoning applies with even greater force herein, because the just-cause provision in the CBA even more expressly and unequivocally covers the right allegedly violated that underlies the alleged refusal to bargain/unilateral change. I must therefore conclude that although the Union has met the jurisdictional requirement of establishing it is a party in interest as to its claim under Sec. 111.70(3)(a)4, Stats., this claim must fail as a matter of law.

2. SPEAA's Claim Under Sec. 111.70(3)(a)5, Stats.

SPEAA is also the party expressly "entitled under the substantive law to enforce the right sued upon", and, as such, is a party in interest, regarding its claim that the District "fail[ed] to submit the grievance to binding arbitration", in violation of Sec. 111.70(3)(a)5. (Compl. ¶ 11.) Section 111.70(3)(a)5, Stats., provides in pertinent part:

> (3) Prohibited practices and their prevention. (a) It is a prohibited practice for a municipal employer individually or in concert with others: . . .
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> . . .
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> 5. To violate any collective bargaining agreement previously agreed upon *by the parties* with respect to wages, hours and conditions of employment affecting municipal employees, including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . .

(Emphasis added.) It is undisputed that SPEAA, as the exclusive bargaining representative, was a party to the agreement; therefore, the Union is a party in interest regarding its claim that the District violated that agreement by refusing to arbitrate Ms. Okray's just-cause claim. *Accord* General Drivers and Helpers Union, Local 662 v. Wisconsin Employment Relations Bd., 21 Wis. 2d 242, 251, 124 N.W.2d 123, 128 (1963) ("The Union as party to the contract which was allegedly breached is the statutory representative of the employees and therefore a party in interest, as that term is used in sec. 111.07(2)(a), Stats.") In the following section (II.) of this decision, I address whether the passage of Acts 10 and 32 bar the Union's claim under Sec. 111.70(3)(a)5, Stats., but resolution of that question cannot disturb the Union's status as a party in interest.

Lastly, to the extent that Surfside Manor and Hospital and Service Employees' International Union, Local 150, Dec. Nos. 15267 and 15268 (WERC, 5/73) (collectively Surfside Manor) may apply herein, those decisions also support the conclusion that SPEAA is a party in interest in this case. Surfside Manor addressed the meaning of "party in interest" in the context of WEPA and concluded:

> In considering our previous decisions, related above, and the definitions contained in Section 111.02(1) and (4) and the language contained in Section 111.05(1), WEPA, the Commission determines that in order to be a proper party in interest in a complaint proceeding a labor organization or "person" must either (1) be authorized by the employes involved to represent them for the purposes of collective bargaining, or (2) said organization or "person" claims to represent those employes for the purposes of collective bargaining, and (3) or said labor organization or "person" may be the "representative" authorized by an employe or employes to seek legal redress with respect to alleged unfair labor practices affecting such employe or employes. Section 111.05(1) contemplates the latter conclusion, in that the section cited permits an individual employe, or any minority group of employes in any collective bargaining unit, to present grievances to their employer "in person or through representatives of their own choosing". . .

Id. Here, SPEAA was not only the exclusive bargaining representative when Ms. Okray was fired, but also "the 'representative' authorized by [Ms. Okray] to seek legal redress with respect to alleged [prohibited] practices affecting [her]" Id. , as she is not a party to this action. Moreover, Sec. 111.70(4)(d)1, Stats., is a provision in MERA comparable to the above-cited provision in WEPA, Sec. 111.05(1), Stats. The section in MERA provides in relevant part:

> Any individual employee, or any minority group of employees in any collective bargaining unit, shall have the right to present grievances to the municipal employer in person or through representatives of their own choosing . . .

While I need not determine to what extent Surfside Manor may be distinguishable as a decision arising under, and interpreting WEPA, insofar as it may be instructive herein, it too supports a finding that SPEAA is a party in interest.

B. Whether SPEAA Has Standing

While I am unpersuaded, as discussed above, by the District's argument that SPEAA lacks standing because it ceased to exist when it did not recertify, I now address whether the Union's loss of exclusive representative status equates to a loss of standing.

The Wisconsin Supreme Court recently undertook an exhaustive review of the law of standing, which, it observed, has enjoyed neither clarity nor consistency:

> Cases have used a variety of tests to determine whether the party challenged has standing. No single longstanding or uniform test for standing appears in the case law. The terminology used in standing cases often turns on the nature of the case, but even in the same category of cases, the terminology for the test for standing or the application of the test is not consistent. In stating the test for standing, the cases have not paid close attention to the factual or legal distinctions among the cases.

Foley-Ciccantelli v. Bishop's Grove Condominium Ass'n, Inc., 2011 WI 36, ¶ 39, 333 Wis. 2d 402, 420, 797 N.W.2d 789, 798. Fortunately, the Court distilled the law into three factors on which standing depends regardless of the nature of the case:

> On careful analysis of the cases, it is clear that the basic thrust of all the cases, the essence of the determination of standing, regardless of the nature of the case and the particular terminology used in the test for standing, is that standing depends on (1) whether the party whose standing is challenged has a personal interest in the controversy (sometimes referred to in the case law as a "personal stake" in the controversy); (2) whether the interest of the party whose standing is challenged will be injured, that is, adversely affected; and (3) whether judicial policy calls for protecting the interest of the party whose standing is challenged.

Id., 2011 WI 36, ¶ 40, 333 Wis. 2d at 421-422, 797 N.W.2d at 798-799 (footnotes omitted). Moreover, "[s]tanding in Wisconsin is not to be construed narrowly or restrictively, but rather should be construed liberally." Id., 2011 WI 36, ¶ 38, 333 Wis. 2d at 420, 797 N.W.2d at 798.

Applying these factors to the facts herein and construing the factors liberally yields little doubt that the Union has standing to litigate its claim under Sec. 111.70(3)(a)5, Stats., notwithstanding the loss of its exclusive representative status. After Ms. Okray's employment was terminated allegedly without just cause, SPEAA availed itself of the contractual grievance procedure, including a request for arbitration on July 25, 2011. That same day *via* correspondence, the District asserted that the grievance was not subject to binding arbitration and refused to process the grievance to arbitration. However, at that time (and until 4:31 p.m. on September 30, 2011), the Union still enjoyed exclusive representative status.

That the Union had a personal stake in the controversy (the first factor) is clear, in light of the relevant statutory and contractual provisions. The prohibited practice set forth in Sec. 111.70(3)(a)5, Stats., concerns the violation of "any collective bargaining agreement previously agreed upon *by the parties*" to the agreement, "including an agreement to arbitrate questions arising as to the meaning or application of the terms of a collective bargaining agreement. . . ."

As a party to the CBA, SPEAA obviously has a personal stake in the allegation that the agreement was breached. Moreover, Article 6 of the CBA sets forth the grievance procedure, Section 6 of that article addresses the arbitration procedure, and Subsection 2 of Section 6 details the procedure by which the Board and the SPEAA (not the grievant) shall choose an arbitrator. Thus, I doubt that an individual employee such as Ms. Okray could even pursue arbitration. In any event, SPEAA had that contractual right and alleges the District violated it.

Second, the Union's interest in pursuing arbitration on behalf of Ms. Okray would be not merely adversely affected but completely vanquished by the District's alleged refusal to arbitrate. And while "[a]n injury to even a "trifling interest" may suffice", Id., 2011 WI 36, ¶ 40, n. 17, 333 Wis. 2d at 422, 797 N.W.2d at 799 (citations omitted), the injury here could hardly be characterized as such. In its capacity as the exclusive bargaining representative, the Union sought to arbitrate a dispute over the most severe possible discipline imposed on one of its unit members: employment termination. Moreover, the Union also has an interest in enforcing its contracts.

Lastly, judicial policy calls for protecting SPEAA's interest in pursuing arbitration. The grievance procedure provides for arbitration, and Sec. 111.70(3)(a)5, Stats., makes the refusal to arbitrate questions regarding the terms of a CBA a prohibited practice on which a claim can be based. Whether Act 10 prohibits arbitration beyond the School Board level, as the District alleges, goes to whether the Union's allegedly infringed contractual right was superseded by legislation, not to whether judicial policy calls for protecting such a right, if it survives.

II. WHETHER ACT 10 BARS ARBITRATION OF THE JUST-CAUSE CLAIM

The District argues that because Act 10 prohibits arbitration beyond the School Board level and was in effect when the grievance was brought before the School Board in mid-July, 2011, the Act bars arbitration in this case. Notably, although the employment termination occurred while the CBA was still in effect, both the Union's request and the Board's refusal to arbitrate occurred after the CBA had expired (but while the Union still retained its exclusive representative status). Thus, if the continued viability of the contractual right to arbitrate depends on whether the underlying dispute to be arbitrated (termination without just cause) arose during the life of the contract, then Acts 10 and 32 would not bar arbitration, for those Acts first applied on the day on which the CBA expired and did not apply retroactively. If, on the other hand, the contractual right to arbitrate expired with the expiration of the CBA, then Acts 10 and 32 are inconsequential, because the Union would have no claim under Sec. 111.70(3)(a), Stats. Thus, the issue that the District frames as whether Act 10 bars arbitration effectively becomes whether the District can be forced to follow the arbitration terms of an expired collective bargaining agreement, when the underlying dispute to be arbitrated arose during the existence of the contract.

United States Supreme Court decisions interpreting the NLRA, if applicable as persuasive authority, suggest that this issue should be resolved in the Union's favor. *See* Nolde Bros., Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO, 430 U.S. 243, 97 S.Ct. 1067 (1977) and Litton Financial Printing Div., a Div. of Litton Business Systems, Inc. v. N.L.R.B., 501 U.S. 190, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991). The Commission has observed that "although the [National Labor Relations Act (NLRA)] differs from MERA in some important respects and the Commission is not bound to follow or even consider NLRA precedent, the Commission may find guidance there in appropriate situations." Western Racine Special Education Association, Professional Unit v. Racine County Dec. No. 31377-C (WERC, 6/06). I believe this is one such appropriate situation and thus consider Nolde Bros., Litton, and other cases with respect to the issue identified above.

Nolde Bros. addressed an employer's refusal to arbitrate the issue of whether plant employees were entitled to severance pay following the union's decision to terminate a collective bargaining agreement and the employer's closing of the plant. The Court held that although the employees' claim for severance pay arose after the contract was terminated, the claim arose under the collective bargaining agreement and was thus subject to resolution under the contractor's arbitration terms. The Court reasoned:

> Our prior decisions have indeed held that the arbitration duty is a creature of the collective-bargaining agreement and that a party cannot be compelled to arbitrate any matter in the absence of a contractual obligation to do so. *Adherence to these principles, however, does not require us to hold that termination of a collective-bargaining agreement automatically extinguishes a party's duty to arbitrate grievances arising under the contract. Carried to its logical conclusion that argument would preclude the entry of a post-contract*

> *arbitration order even when the dispute arose during the life of the contract but arbitration proceedings had not begun before termination*. The same would be true if arbitration processes began but were not completed, during the contract's term. *Yet it could not seriously be contended in either instance that the expiration of the contract would terminate the parties' contractual obligation to resolve such a dispute in an arbitral, rather than a judicial forum. See* John Wiley & Sons, *supra*; Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960); Machine Workers v. Oxco Brush Div., 517 F.2d 239, 242-243 (CA6 1975); Procter & Gamble Ind. Union v. Procter & Gamble Mfg. Co., 132 F.2d 181, 186 (CA2 1962), cert. denied, 374 U.S. 830, 83 S.Ct. 1872, 10 L.Ed.2d 1053 (1963). Nolde concedes as much by limiting its claim of nonarbitrability to those disputes which clearly arise after the contract's expiration.

Nolde Bros., Inc. v. Local No. 358, Bakery and Confectionery Workers Union, AFL-CIO, 430 U.S. 243, 250-251, 97 S.Ct. 1067, 1071-1072 (U.S., 1977) (emphasis added).

In Litton, the Court further clarified when post-expiration grievances arise under contract when it was asked "to determine whether a dispute over layoffs which occurred well after expiration of a collective-bargaining agreement must be said to arise under the agreement despite its expiration." Litton, 501 U.S. 190, 193, 111 S.Ct. 2215, 2218 (1991). The Court concluded in relevant part:

> . . . we come to the crux of our inquiry. We agree with the approach of the Board and those courts which have interpreted Nolde Brothers to apply only where a dispute has its real source in the contract. The object of an arbitration clause is to implement a contract, not to transcend it. Nolde Brothers does not announce a rule that postexpiration grievances concerning terms and conditions of employment remain arbitrable. A rule of that sweep in fact would contradict the rationale of Nolde Brothers. *The Nolde Brothers presumption is limited to disputes arising under the contract. A postexpiration grievance can be said to arise under the contract only where it involves facts and occurrences that arose before expiration*, where an action taken after expiration infringes a right that accrued or vested under the agreement, or where, under normal principles of contract interpretation, the disputed contractual right survives expiration of the remainder of the agreement.

Id., 501 at 205-206, 111 S.Ct. at 2225 (emphasis added).

Applying the principles of Nolde Bros. and Litton compels the conclusion that the District herein had an obligation to arbitrate, because the underlying dispute arose before the CBA expired. This case does not involve accrued or vested rights, but rather "facts and occurrences [*i.e.* events culminating in termination allegedly without just cause] that arose before expiration" of the CBA. Id. As such, the just-clause claim herein is arbitrable under

Nolde Bros. and Litton. *See also* District 2 Marine Engineers Beneficial Association--Associated Maritime Officers, AFL-CIO v. Puerto Rico Marine Management, Inc. , 537 F.Supp. 813, 816 (D.C.N.Y., 1982) (noting that "arbitrability of [union's] claim that its members were discharged without cause depends upon a determination whether the collective bargaining agreement was in effect at the time of the discharges"); Glover Bottled Gas Corp. v. Local Union No. 282, International Brotherhood of Teamsters, 711 F.2d 479, 482 (2d Cir.1983) (finding discharge of employees arbitrable where all acts leading to discharge occurred before termination of contract); Northern Cal. Dist. Council of Hod Carriers v. Pennsylvania Pipeline, Inc. , 103 Cal.App.3d 163, 172 (Cal.App.1.Dist.1980) (noting that "[t]ermination of a collective bargaining agreement does not extinguish the duty to arbitrate if a dispute arose during the life of the agreement"); Oil, Chemical and Atomic Workers Intern. Union Local No. 4-23 v. American Petrofina Co. of Texas, 820 F.2d 747, 750, n. 3 (5th Cir. 1987) (rejecting argument that discharge was arbitrable, where contract was no longer in effect when the dispute arose); Ottawa County v. Jaklinski 423 Mich., 1, 25-26, 377 N.W.2d 668, 678 (Mich.,1985) (observing that "[an employee's] failure to be reappointed would have been arbitrable had it occurred prior to the contract's expiration); Cadillac Industries, Inc. v. Amalgamated Clothing & Textile Workers Union , 775 F.Supp. 30, 33 (Dist. Puerto Rico 1991) (concluding that "discharge grievance did not have to be submitted to arbitration" where discharge occurred more than a year after expiration of collective bargaining agreement).

Citing various cases[5] for the general proposition that contracts made in violation of statutes or for the performance of acts prohibited by statute are void, the District concludes that any contract purporting to allow arbitration would be void under Act 10. However, the District's authorities are inapposite and its conclusion is invalid, because unlike here, the statutes at issue in the cited cases existed before the contracts in question were made. None of these cases disturb my conclusion that I must deny the District's motion to dismiss as to the Union's claim that the District's refusal to arbitrate the just-cause issue violated Sec. 111.70(3)(a)5, Stats.

III. WHETHER GRIEVANCE IS NOT ARBITRABLE BECAUSE UNTIMELY

Lastly, the District maintains that even if the CBA were in effect, the grievance is not arbitrable, because SPEAA failed to comply with the contractual two-week time limit for appealing the grievance to the superintendent. Having concluded that the District's refusal to arbitrate was unlawful, I further conclude that any procedural challenges (including timeliness) regarding the grievance procedure must be decided by an arbitrator. *See* City of St. Francis, Dec. No. 12097-D (WERC, 10/74) (noting that "questions of procedural arbitrability, *i.e.* whether the party seeking arbitration has complied with the contractual grievance procedure's preliminary steps, are strictly for the arbitrator to determine."); Waupaca County, Decision No. 32001-B (WERC, 11/07) (same); Rock County, Dec. No. 29970-B (WERC, 7/01)

[5] Milwaukee Police Ass'n v. City of Milwaukee, 113 Wis. 2d 192, 196, 335 N.W.2d 417, 419 (Ct. App. 1983), Guardian Agency v. Guardian Mut. Sav. Bank, 227 Wis. 550, 279 N.W. 79, 82 (1938), and International Union, United Auto. Aircraft & Agr. Implement Workers of America, Local 180, CIO v. J. I. Case Co., 250 Wis. 63, 73, 26 N.W.2d 305, 310 (1947).

(referring to untimely grievance filing as a procedural defense to be raised before an arbitrator).

CONCLUSION

For the foregoing reasons, the District's motion to dismiss is denied in part and granted in part. The motion is granted as to SPEAA's claim under Sec. 111.70(3)(a)4, Stats., that the District failed to bargain in good faith by unilaterally changing working conditions by discharging Ms. Okray without just cause. However, the District's motion to dismiss is denied as to SPEAA's claim that the District failed to submit the grievance to binding arbitration in violation of Sec. 111.70(3)(a)5, Stats.

Dated at Madison, Wisconsin, this 26th day of September, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Examiner

JCC/gjc
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