

STATE OF WISCONSIN  
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

---

**CARMEN J. BERTELSEN**, Complainant,

vs.

**PIERCE COUNTY NURSES ASSOCIATION, LOCAL 901 OF THE LABOR  
ASSOCIATION OF WISCONSIN, INC. and PIERCE COUNTY**, Respondents.

Case 155  
No. 71700  
MP-4728

**Decision No. 33980-A**

---

**Appearances:**

**Attorney Jennifer A. Nodes**, Eckberg, Lammers, Briggs, Wolfe, & Vierling, P.L.L.P., 1809 Northwestern Avenue, Stillwater, Minnesota 55082, appearing on behalf of the Complainant Carmen J. Bertelsen.

**Attorney Carol N. Skinner**, Skinner and Associates, 212 Commercial Street, Hudson, Wisconsin 54016, appearing on behalf of the Pierce County Nurses Association, Local 901 of the Labor Association of Wisconsin.

**Attorney Mindy J. Dale**, Weld, Riley, Prenn & Ricci, S.C., 3624 Oakwood Hills Parkway, P.O.Box 1030, Eau Claire, Wisconsin 54702-1030, appearing on behalf of Pierce County.

**ORDER GRANTING IN PART AND  
HOLDING IN ABEYANCE IN PART MOTIONS TO DISMISS**

On August 3, 2012, Complainant filed her complaint with the Wisconsin Employment Relations Commission, alleging that Pierce County (hereinafter "County") had violated Sec. 111.06(1)(f), 111.84(1)(e) and 111.70(3)(a)1 and 5 by discharging the Complainant without just cause and by failing to properly execute the grievance provisions outlined in Article VIII of the parties' Collective Bargaining Agreement. The complaint against Pierce County Nurses Association, Local 901 of the Labor Association of Wisconsin (hereinafter collectively referred to as the "Union") alleges a failure in its duty of fair representation by failing to properly execute the grievance provisions outlined in Article VIII of the Collective

No. 33980-A

Bargaining Agreement and its failure to enforce the terms of said Agreement. On November 2, 2012, Steve Morrison, an Examiner on the Commission's staff was appointed to conduct a hearing and to make and issue appropriate Findings, Conclusions and Orders. Notice of Hearing on Complaint, scheduling the hearing dates for January 15 and January 16, 2013, was issued on November 2, 2012. On November 20, 2012 the County and Union both filed motions to dismiss the complaint. The Complainant filed her written response in opposition to the County's/Union's motions to dismiss on December 11, 2012. On January 2, 2013 the Examiner converted the hearing date of January 15, 2013 to a pre-hearing conference for the purpose of allowing the parties to present arguments on their respective motions. Following the pre-hearing conference the Parties filed briefs in support of their positions, the last of which was received on February 21, 2013. Having considered the parties' pleadings and the applicable law,

NOW THEREFORE, it is

**ORDERED**

1. The Motion to Dismiss on behalf of the County as to those allegations contained in Subparagraph A of Paragraph III is granted. The balance of the County's motion is temporarily denied and held in abeyance pending a full hearing.

2. The Motion to Dismiss on behalf of the Union is temporarily denied and held in abeyance pending a full hearing.

Dated at Wausau, Wisconsin, this 8th day of April, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

---

Steve Morrison, Examiner

PIERCE COUNTY (Carmen J. Bertelsen)

**MEMORANDUM ACCOMPANYING ORDER**  
**GRANTING IN PART AND HOLDING IN ABEYANCE IN PART**  
**MOTIONS TO DISMISS**

The Complainant asserts that she was discharged by Pierce County from her employment without just cause and in violation of the Collective Bargaining Agreement; that by her discharge absent just cause the County committed a prohibited practice in violation of Sec. 111.70(3)(a)1 and 5 Stats.; that by failing to properly execute the grievance provisions of the CBA, the County committed an “unfair labor practice” in violation of Sec. 111.70(3)(a)1 and 5, Stats.; and by failing to properly execute the provisions in Article VIII of the CBA, and enforce the terms contained therein, the Union has failed in its duty of fair representation and committed an “unfair labor practice” in violation of Sec. 111.70(3)(a)1 and 5, Stats. (Although the Complainant failed to set forth the specific statutory sections applicable to her claim the Undersigned will presume she was referring to Sec. 111.70(3)(b) 1 and 4 since her complaint asserts a breach of the Union’s duty of fair representation.) She also alleges violations of Sec. 111.06(1)(f) and Sec. 111.84(1)(e), Stats. of the State Employment Labor Relations Act (SELRA). Both Respondents filed motions denying the allegations asserted against them and sought dismissal of the complaint.

The Respondents’ motions to dismiss are governed by Chapters 227 and 111 of the Wisconsin Statutes. Chapter 227 establishes the framework for administrative agency proceedings and Chapter 111 provides the basis for prohibited practices under the Municipal Employment Relations Act (MERA). The standard for ruling on pre-hearing motions to dismiss is:

Because of the dramatic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; Racine Unified School District, Dec. No. 27928-B (WERC, 6/94).

Examiner McLaughlin noted in Oneida County, Dec. No. 28240-A (8/98) that Sec. 227.01(3), Stats., defines a “Contested case” to mean:

“. . .an agency proceeding in which the assertion by one party of any substantial interest is denied or controverted by another party and in which, after a hearing required by law, a substantial interest of a party is determined or adversely affected by a decision or order.”

The Commission is an “Agency” under Sec. 227.01(1), Stats., thus making this proceeding an “agency proceeding.” To be a contested case under Sec. 227.01(3), Stats., the proceeding must involve a controverted, substantial interest which will be determined after a hearing required by law. . .

Complainant has asserted a substantial controversy in her complaint that, as reflected in the pleadings, is controverted by Respondents.

Examiner McLaughlin also noted in Oneida County, *supra*:

Chapter 227 does not provide a summary judgment procedure. The right to hearing is explicit, and the dismissal of a contested case prior to evidentiary hearing is not. Pre-hearing dismissal of a contested case is, then, an uncommon result:

Dismissal prior to evidentiary hearing would be proper if based on lack of jurisdiction, lack of timeliness and in certain other cases. . . (It would be a rare case where circumstances would permit dismissal of the proceedings prior to the conclusion of a meaningful evidentiary hearing on other than jurisdictional grounds or a failure of the complaint to state a cause of action. (cite omitted)

As to the allegations relating to Wisconsin Statutes 111.06(1)(f) and 111.84(1)(e), neither of these sections apply to the facts in this case. As noted above, they are SELRA actions and they are not applicable, though they are similar to, our MERA-based allegations. Consequently, these allegations have been dismissed.

Complainant alleges the County violated her rights under a collective bargaining agreement between the County and the Union by terminating her employment. Such an alleged contractual breach is a violation of Sec. 111.70(3)(a)5, Stats. Where, as here, the collective bargaining agreement provides for final and binding grievance arbitration, the Commission generally does not assert its jurisdiction over the breach of contract claim, since the grievance/arbitration procedures are presumed to be the exclusive means of resolving such disputes. 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); City of Menasha, Dec. No. 13283-A (WERC, 2/77); Monona Grove School District, Dec. No. 22414 (WERC, 3/85); West Salem School District, Dec. No. 32696-D (10/09)

If Complainant, however, can prove that the Union failed to fairly represent her and thereby thwarted her efforts to pursue a grievance over the alleged breach of contract, the Commission will assert its jurisdiction to determine whether the agreement has been violated. Mahnke, *supra*; Gray, *supra*; Milwaukee Board of School Directors (Bishop), Dec. No. 31602-C (WERC, 1/07); West Salem School District, *supra*. In addition to allowing an employee to invoke our jurisdiction over her contract claim against the County, a union’s breach of its duty

of fair representation may also be alleged as a prohibited practice in violation of Sec. 111.70(3)(b)1 Stats. In light of the foregoing analysis the County's argument that Complainant raises a claim against the County over which the Commission will not assert its jurisdiction is rejected.

Accordingly, the motions to dismiss are temporarily denied pending a full hearing.

Dated at Wausau, Wisconsin, this 8th day of April, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Steve Morrison /s/

---

Steve Morrison, Examiner

SM/gjc  
33980-A