STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

TIMOTHY OTTO, Complainant,

and

RACINE WATERWORKS COMMISSION and
KEITH HAAS, General Manager, Respondent.

Case ID: 400.0001
Case Type: COMP_MP

DECISION NO. 36172-A

Appearances:

Timothy Otto, 511 Augusta Street, Racine, Wisconsin, 53402, appearing on his own behalf.

Mark Olson and Kevin Pollard, Attorneys, Buelow Vetter Buikema Olson & Vliet, LLC, 20855 Watertown Road, Suite 200, Waukesha, Wisconsin, 53186, appearing on behalf of the Respondent.

ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

On November 23, 2015, Timothy Otto filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against the Racine WaterWorks Commission and Keith Haas, General Manager (hereinafter the Utility or the Respondent). The complaint alleged that the Utility had failed to provide him with a wage premium increase after he received his facilities engineer license in December, 2012. On January 15, 2016, the Utility filed a motion to dismiss the complaint. On January 18, 2016, Otto filed a response opposing the motion. The Commission formally appointed Raleigh Jones to make and issue findings of fact, conclusions of law and order as provided in § 111.07(5), Stats. No evidentiary hearing has yet been conducted in this matter. Having considered the pleadings, as well as the arguments of the parties, I am satisfied that the Utility's motion to dismiss should be granted. Accordingly, I hereby make and issue the following Order Granting Respondent's Motion to Dismiss.

ORDER

The Respondent's motion to dismiss is granted and the complaint is dismissed.

Dated at the City of Madison, Wisconsin, this 23rd day of February 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Raleigh Jones, Examiner

MEMORANDUM ACCOMPANYING ORDER GRANTING RESPONDENT'S MOTION TO DISMISS

As noted in this decision's prefatory paragraph, the Respondent Utility filed a motion to dismiss the complaint. The motion alleges that: 1) the complaint is untimely; and 2) no interpretation of the facts alleged in the complaint can establish any prohibited practice or unfair labor practice by the Utility.

I. The Legal Standards Applicable to a Motion to Dismiss

Chapter 111.02 of the Wisconsin Statutes provides the basis for unfair labor practices under the Wisconsin Employment Peace Act (WEPA). Chapter 111.70 of the Wisconsin Statutes provides the basis for prohibited practices under the Municipal Employment Relations Act (MERA). Both of these statutes are administered by the Wisconsin Employment Relations Commission.

A complainant does not have an automatic right to a hearing before the Commission on their complaint. Prehearing motions to dismiss are used to ferret out allegations that on their face fall outside the Commission's jurisdiction, are untimely, or are so vague that the respondent cannot prepare for hearing. *Professional Technical Council, WEAC and Blackhawk Technical College*, Dec. No. 30023-D (WERC, 10/2003). Thus, an examiner can dismiss a complaint without a hearing when the Commission lacks jurisdiction over the allegations, or the complaint is untimely, or the complaint fails to state a claim. See, for example, *City of Kenosha*, Dec. No. 33271-A (Jones, 7/2011), aff'd, Dec. No. 33271-B (WERC, 8/2011).

Timeliness issues are governed by § 111.07(14), Stats. That section, which is applicable to MERA under § 111.70(4)(a), Stats., states: "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." In this case, the Otto filed his complaint on November 23, 2015. To be timely filed, the complaint must allege that a prohibited practice occurred within the one-year period preceding that date.

Commission examiners have long cited the following standard when ruling on the merits of a prehearing motion to dismiss:

> Because 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. 27982-B (WERC, 6/94).

That standard will be applied here as well.

II. Application of Those Legal Standards to the Complaint

Since no evidentiary hearing has been conducted in this matter, the following facts are taken from the complaint and its attachments. For the purpose of this decision, it is assumed that the facts which Otto pled are true.

Prior to 2011 Wisconsin Act 10 – the 2011 law which significantly changed MERA and the scope of public sector collective bargaining in Wisconsin – the Utility and AFSCME Local 63 were parties to a series of collective bargaining agreements. Among other things, those collective bargaining agreements established licensure pay premiums for employees who obtained certain licenses. The parties' last collective bargaining agreement covered the time period of January 1, 2011 through December 31, 2012. Otto was the local union president when that agreement was negotiated. That agreement provided, in pertinent part, that employees who obtained a facilities engineer license would be paid a 50 cent an hour premium. Otto, who is a long-time employee, obtained a facilities engineer license on December 17, 2012. Thereafter, he sought to be paid the premium just referenced. In February of 2013, Otto was told by his then supervisor that the Utility was not going to pay him the premium he sought. Since then, Otto has never been paid the 50 cent an hour premium that he sought for getting a facilities engineer license. For the next two years, Otto engaged in what he characterized as a "dialogue" with various Utility and City officials wherein he tried to get the Utility/City to pay him the 50 cent premium. His attempts to get the premium pay were unsuccessful. On July 1, 2015, Utility Manager Haas responded in writing to Otto about this matter. In that response, Haas referenced the parties' bargaining history for the 2011-2012 collective bargaining agreement and the eligibility requirements for licensure pay that were part of that agreement. Haas relied on same to justify the Utility's decision to not pay Otto the premium pay that he sought. On August 10, 2015, Otto grieved that determination per the City's grievance procedure which was established after Act 10. Otto's grievance alleged a violation of the 2011-2012 collective bargaining agreement. On August 14, 2015, the Utility denied Otto's grievance. After that, Otto sought to have his grievance arbitrated. On September 18, 2015, the City declined to arbitrate his grievance. After that, Otto filed the initial complaint. The complaint alleged that, by its conduct, the Utility had violated the following statutes: §§ 111.06(1)(a) and (f); 111.06(2)(c); 111.70(3)(a)(5)-(8); and 111.70(3)(b)(3), (4) and (7).

* * *

The Examiner finds that even if all of the facts in the complaint are construed in Otto's favor, he has failed to state a claim against the Utility. My rationale follows.

Before I get into that though, I'm first going to address the Utility's contention that the complaint is untimely.

The basis of the Utility's timeliness claim is that the clock started to run either: 1) when Otto obtained his facilities engineer license (which occurred December 17, 2012); or 2) when the parties' 2011-2012 collective bargaining agreement expired (which happened December 31, 2012); or 3) in February, 2013, when Otto's then supervisor told him that the Utility was not going to pay him the premium he sought. I'm not going to use any of those events as the basis for starting the clock. Here's why. It would be one thing if the record showed that Otto did nothing to move this matter along after the last item just referenced (i.e. his then supervisor telling him in February 2013 that the Utility was not going to pay him the premium he sought). However, the record shows just the opposite, namely that Otto continued to fight with City officials over this matter for the next several years. In July, 2015, in response to Otto's perseverance and doggedness on this matter, Utility General Manager Haas finally responded in writing to Otto's claim. That was significant because it was the Utility's first written response denying Otto's claim for a stipend payment. Thereafter, Otto filed both his grievance and his request for grievance arbitration. When both were denied by the Utility, Otto filed the instant complaint on November 23, 2015. Given that all the written correspondence in this matter occurred in 2015, I have no trouble finding that the complaint was timely filed.

Having addressed the Utility's timeliness contention, I'm now going to address all of Otto's claimed WEPA and MERA violations.

Section 111.06(1)(a), Stats., states that it is an unfair labor practice for an employer to interfere with, restrain or coerce the employee in the exercise of the right of self-organization and to form labor organizations, or to refrain from such organizations, as guaranteed under § 111.04, Stats. This section is inapplicable to the present matter because Otto has not alleged any facts which even suggest interference on the part of the Utility.

Sections 111.06(1)(f) and 111.06(2)(c) pertain solely to violations of the terms of a (private sector) collective bargaining agreement. To the extent that the complaint alleges a violation of a collective bargaining agreement, the provision just cited is part of WEPA. That law applies to private sector employees. Otto is not a private sector employee; he's a public sector employee. The law that applies to public sector employees is MERA. That law is addressed in the next paragraph.

Sections 111.70(3)(a)(5)-(8), Stats., and also §§ 111.70(3)(b)(3), (4) and (7), Stats. are part of MERA. Those sections pertain to violations of (public sector) collective bargaining agreements, to unlawful deductions of labor organization dues, to refusals to implement an arbitration decision, refusals to collectively bargain over lawful subjects of bargaining, or

failures to follow grievance arbitration procedures. None of these sections are applicable here because of the following: first, the passage of Wisconsin Act 10 in 2011; and, second, the agreement upon which Otto based his original grievance – the parties' 2011-2012 collective bargaining agreement – is no longer in effect. That agreement expired on December 31, 2012. It has not been in effect since its December 31, 2012 expiration. Because of Act 10, when the parties' 2011-2012 collective bargaining agreement expired on December 31, 2012, subsequent collective bargaining agreements between AFSCME and the Utility – if there were any – could not have a contract provision governing or addressing licensure pay. Simply put, it was a prohibited subject of bargaining going forward, meaning that the parties were prohibited by statute – specifically § 111.70(mb)1 – from bargaining or negotiating over such an item. That means that after the 2011-2012 collective bargaining agreement expired on December 31, 2012, there was no longer any provision governing licensure pay, and Otto's claim for licensure pay pursuant to that agreement evaporated. Still another part of Act 10 eliminated traditional grievance arbitration procedures for general municipal employees (such as Otto). That means that the Utility is precluded by law from going to grievance arbitration on his grievance as Otto proposes. When considered in that context, it is apparent that Otto's complaint is an attempt to use one part of the expired 2011-2012 collective bargaining agreement – namely the part that referenced a licensure pay premium for getting a facilities engineer license – as the basis to claim a violation of the various MERA provisions previously cited. His attempt to do that is unsuccessful. The reason is this: once the parties' 2011-2012 collective bargaining agreement expired, so did any MERA claim related to it. Said another way, once the 2011-2012 collective bargaining agreement expired on December 31, 2012, there was no contract governing licensure pay, and therefore no basis for any claim predicated upon the terms of that contract.

Additionally, after the parties' 2011-2012 collective bargaining agreement expired, still another part of Act 10 required that municipal employers establish a civil service procedure or internal grievance procedure for all general employees that governed employee discipline, termination, and workplace safety. By statute, those were the only three employment areas that could be subject to the employer's grievance procedure. Implicit in same was that all other types of employment actions – which are myriad in number – could not be subject to the employer's grievance procedure. Consistent with Act 10, the Utility adopted a policy manual on January 1, 2013 that governs the employment status of Utility employees. That policy manual expressly provides that there are only three employment areas that can be the subject of a grievance. They are: "Discipline, Termination, and Workplace Safety." Significantly, Otto's grievance does not involve any of those three employment areas. As already noted, Otto's grievance seeks to challenge the Utility's failure to provide him with a supplemental wage premium for obtaining his facilities engineer license which was to be provided pursuant to a collective bargaining agreement which has not been in existence since December 31, 2012. Since Otto's grievance does not involve any of the three employment areas that can be challenged under the Utility's grievance procedure, Otto does not have a valid claim under the Utility's policy manual either.

In sum then, the complaint does not state a claim that any unfair labor practices (within the meaning of WEPA) or prohibited practices (within the meaning of MERA) were committed by the Utility. As a result, the complaint has been dismissed.

Dated at the City of Madison, Wisconsin, this 23rd day of February 2016.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Examiner