

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

MATHEW LANE, Complainant,

vs.

STATE OF WISCONSIN DEPARTMENT OF CORRECTIONS, Respondent.

Case ID: 1.0124
Case Type: COMP-PP(S)

DECISION NO. 36964-A

Appearances:

Paul J. Mertz, Representative, P.O. Box 181, Redgranite, Wisconsin, appearing on behalf of Mathew Lane.

William H. Ramsey, Legal Counsel, Department of Administration, 101 East Wilson Street, 10th Floor, P.O. Box 7864, Madison, Wisconsin, appearing on behalf of the State of Wisconsin Department of Corrections.

ORDER GRANTING MOTION TO DISMISS

On March 16, 2016, Mathew Lane filed a complaint with the Wisconsin Employment Relations Commission alleging that the State of Wisconsin Department of Corrections had violated his due process rights to challenge a written reprimand by limiting the role of his representative during the first step of the State's grievance procedure. The complaint was assigned to Examiner Peter G. Davis. The complaint was subsequently amended to assert that the State had committed an unfair labor practice within the meaning of § 111.84(1)(a), Stats.

The State subsequently filed a motion to dismiss the complaint and written argument was filed in support of and in opposition to the motion. By agreement of the parties, the matter was then held in abeyance. On June 19, 2017, the State requested a ruling on the motion to dismiss; Lane advised that he would withdraw the complaint if the State were to reimburse him for the \$100 filing fee he paid to the Commission; the State declined Lane's settlement offer; and, on June 21, 2017, Lane advised the Examiner that he wanted to pursue the complaint.

Having reviewed the record and being fully advised in the premises,

NOW, THEREFORE, it is

ORDERED

The complaint is dismissed.

Signed at the City of Madison, Wisconsin, this 6th day of July 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner

MEMORANDUM ACCOMPANYING ORDER GRANTING MOTION TO DISMISS

Wisconsin Admin. Code § ERC 12.04(2)(f) is made applicable to this proceeding by Wis. Admin. Code § ERC 22.04 and states in pertinent part:

A motion 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.

The fact alleged in Lane's complaint is that the State of Wisconsin Department of Corrections conducted a first-step grievance meeting as to Lane's February 1, 2016, written reprimand in a manner consistent with DOC Policy 200.30.303. Lane's legal theory is that the limitations on the role of his representative imposed during that meeting by DOC Policy 200.30.303 violated his § 111.82 right "to engage in lawful, concerted activities for the purpose of ... mutual aid or protection." The State argues that Lane's § 111.82 rights cannot have been violated because the right to have a representative (and the role of any such representative) in a non-union post-discipline context is created by policy not by statute.

DOC Policy 200.30.303 provides the following as to the role of a representative during a post-discipline first-step grievance procedure meeting:

VI. EMPLOYEE'S RIGHT TO REPRESENTATION

During the grievance procedure, an employee may be assisted by a representative.

...

During the grievance procedure, the representative may observe and take notes. The representative may not interfere with the process. The representative will be permitted a limited opportunity to speak during the grievance meeting for the following purposes:

1. Repeat the management representative points the employee has already made;
2. Explain the significance of the points made by the employee;
3. Occasionally confer with the employee in a confidential manner.

I conclude those limitations did not violate Lane's § 111.82 rights and, therefore, I have granted the motion to dismiss the complaint.

To a large extent, Lane contends that the limitations on the role of a representative violate his constitutional right to due process. First, in the context of a statutory unfair labor practice proceeding, it is important and determinative for me to acknowledge that I do not have jurisdiction to enforce any constitutional rights that might be implicated. Second, there are no constitutional due process rights that apply to a post-discipline grievance meeting regarding a written reprimand. The due process rights Lane appears to rely on are in fact limited to: a (1) pre-discipline opportunity to be heard before a government employee is deprived of a property interest; and (2) a post-discipline opportunity to challenge the deprivation before a neutral entity. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S 532 (1985). As evidenced by the WERC's lack of jurisdiction to review the propriety of a written reprimand, receipt of such a reprimand does not deprive an employee of a constitutionally protected property interest, and no due process rights would be violated if the State elected not to provide an opportunity to grieve such reprimands (or for employees not to be represented at all during any grievance meeting).

To prevail under his statutorily-based theory that the limitations on the representative's role violate his ¶ 111.82 right "to engage in lawful, concerted activities for the purpose of ... mutual aid or protection," Lane must provide persuasive argument as what makes the representation "concerted activity" and what "mutual" employee interests are present. He has not done so. In this regard, I note that the role of the representative outlined in DOC Policy 200.30.303 is quite close to the limited ¶ 111.82, Stats., role of a representative in a meeting which an employee reasonably believes might lead to discipline. *N.L.R.B. v. J. Weingarten, Inc.*, 420 U.S. 251 (1975). Clearly, whatever "concerted activity" and "mutual" interest might be present here, they are far less significant where, as here, the discipline has already been imposed than when the question of whether an employee will be disciplined at all hangs in the balance.

Given the foregoing, I have dismissed the complaint.

Signed at the City of Madison, Wisconsin, this 6th day of July 2017.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Examiner