STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

JEROME SCHENCK, Complainant,

and

ARDAGH GROUP, Respondent.

Case ID: 605.0000
Case Type: COMP_CE

DECISION NO. 38977-A

Appearances:

Jerome Schenck, 212 Blackstone Court, South Beloit, Illinois, appearing on his own behalf.

Justin Spack, Legal Counsel, Ardagh Group, 10194 Crosspoint Blvd., Suite 410, Indianapolis, Indiana, appearing on behalf of the Respondent.

ORDER DISMISSING COMPLAINT

On October 16, 2020, Jerome Schenck filed an unfair labor practice complaint with the Wisconsin Employment Relations Commission against Ardagh Group (hereinafter the Company or the Respondent). The complaint alleged that the Company had paid him incorrectly when he was an apprentice, and improperly delayed paying him at the journeyman's rate. The complaint was assigned to Raleigh Jones who was later formally appointed to serve as hearing examiner. On April 29, 2021, the examiner directed the parties to file submissions concerning whether the Commission has jurisdiction to review the merits of Schenck's claim. The parties filed their submissions by May 19, 2021. No evidentiary hearing has been held in this matter. Having considered the complaint, the parties' submissions and their arguments, the examiner declines to invoke the Commission's jurisdiction to review the merits of Schenck's pay claim for the reasons noted in the memorandum.

NOW, THEREFORE, it is

ORDERED

The complaint is dismissed.

Issued at the City of Madison, Wisconsin, this 21st day of July 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Examiner

MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT

In his complaint, Schenck alleges that his employer (Ardagh Group, hereinafter the Company or the Respondent) paid him incorrectly when he was an apprentice, and improperly delayed paying him at the journeyman's rate. Schenck further avers that by doing that, the Company violated three state statutes: the Municipal Employment Relations Act (known as MERA), the State Employment Labor Relations Act (known as SELRA) and the Wisconsin Employment Peace Act (known as WEPA). The Commission administers all three statutes. The first two statutes apply to Wisconsin's public sector and are inapplicable here because the Company is not a public sector employer and Schenck is not a public sector employee. Instead, the Company is a private sector employer and Schenck is a private sector employee. The last statute referenced (WEPA) applies to private sector employers and employees.

There is nothing in WEPA that addresses how apprentices are to be paid or when apprentices become journeymen. However, while those matters are not referenced in WEPA per se, they are referenced in a collective bargaining agreement (hereinafter CBA) that will be referenced later. Schenck essentially asks the Commission to hold a hearing, interpret and apply those sections of that CBA that relate to apprentices and journeymen's pay, find in his favor, and award him back pay. Simply put, that is not going to happen here. For the reasons set forth below, the examiner declines to invoke the Commission's WEPA jurisdiction to decide the merits of Schenck's complaint.

I begin by reviewing the following facts which are taken from the complaint and the submissions filed in this matter. They provide some overall context.

Certain employees in the Mold Making Department at the Company's Burlington, Wisconsin plant are represented by the Steelworkers Union. (Note: The Union is not a named party in this matter). Schenck is one of the employees included in that bargaining unit. The Company and the Union are parties to a CBA covering the employees in that bargaining unit.

That CBA contains a grievance and arbitration procedure. In Article 25 it provides that the Union may file a grievance about any alleged violations of the CBA, and if the parties do not resolve the matter during the grievance procedure, it then proceeds to grievance arbitration.

When this matter arose, Schenck was an apprentice in the mold shop. The previously referenced CBA contains provisions dealing with apprentices and their pay in Article 10 (Hourly Minimum Rate) and Article 12 (Apprentices).

On March 29, 2018, the Union filed a grievance on Schenck's behalf alleging that he was paid improperly under the CBA. Specifically, the grievance alleged that "the employee has not received his 3rd year rate after his seniority date of 3/8/2015, Article 10, Section 2. He also should be adjusted to journeyman rate under Article 12." On January 2, 2019, the Union amended the grievance to reference an alleged past practice that existed at the plant regarding the movement of apprentices to journeyman status. On an unspecified date, the Company responded in writing to

the grievance (Note: The Company's response addressed two separate grievances; only the second response dealt with the Schenck grievance). It provided as follows:

> 3. Aggrieved Employee: Jerome Schenck
> a. Nature of Grievance –
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> The employee has not received his 3rd year rate after his seniority date of 3/8/15. Article 10, Section 2. He also should be adjusted to journeyman rate under Article 12.
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> b. Company's Answer/ Reply – Mr. Schenck currently is earning $24.78. The Company will adjust Mr. Schenck's rate to that of a 4th year apprentice and remit the difference in pay rates retroactively to 3/2/18, his seniority date as an apprentice.
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> Further, pursuant to the first paragraph under Article 12, "those who employ more than two (2) Journeyman Mold makers shall not have apprentices to exceed the ratio of twenty–five (25) percent of the number of journeyman employed." There are 9 journeymen in the Mold Shop presently and four (4) apprentices, one (1) of whom already is earning journeyman rate (Ray Shupe). As such, of the 3 other apprentices, only one (1) other should be adjusted to journeyman rate, and since Brodie Smith has an effective date of apprentice program entry of 3/1/15, his rate is being adjusted to that of a journeyman. Hence, Jerome Schenck is not entitled to journeyman rate at this time.

At some unidentified point thereafter, the Company began paying Schenck at the journeyman's rate.

Also at some unidentified point thereafter, the Company and the Union engaged in collective bargaining. The Schenck grievance was one of the items discussed in bargaining. At some point during the bargaining process, the Union's leadership/bargainers decided to drop the Schenck grievance and did so. While the record does not show why the Union dropped that grievance, Schenck avers he was told his "grievance was dropped so they could get something they wanted put in the new contract." Based on Schenck's quoted statement, it can reasonably be inferred that the Union's leadership/bargainers dropped the Schenck grievance in exchange for obtaining a different unidentified benefit for its members. It can also reasonably be inferred that after Schenck's grievance was dropped by the Union, the Company considered Schenck's pay claim to be closed.

In October 2020 Schenck filed the instant complaint against the Company with the Commission. As already noted, in it he contends he was improperly paid by the Company under the CBA. What Schenck wants the Commission to do here is use the CBA as the vehicle to address and decide the merits of his pay claim.

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Section 111.06 (1)(f) of WEPA makes it an unfair labor practice for an employer "to violate the terms of a collective-bargaining agreement . . ." That section specifically empowers the Commission to hear and adjudicate what are called breach of contract claims. However, just because the Commission has jurisdiction to hear and adjudicate such contractual claims does not mean that we exercise that jurisdiction in all such cases. Here is why. The Commission generally will not assert its statutory complaint jurisdiction over breach of contract claims under a CBA because of the presumed exclusivity of the parties' contractual arbitration procedure and a desire to honor the parties' agreement. *See Mahnke v. WERC,* 66 Wis.2d 524, 529-30 (1974). Consequently, the Commission's long-standing policy regarding breach of contract allegations has been not to assert jurisdiction to determine the merits of breach of contract allegations where the parties' CBA provides for final and binding arbitration of such disputes and such procedure has not been exhausted. *See,* for example, *Joint School District Number 1, City of Green Bay*, Dec. Nos. 16753–A, 16753–B (WERC, 12/79) and *Board of School Directors of Milwaukee*, Dec. Nos. 15825–B, 15825–C (WERC, 6/79).

Technically, this is not a deferral case because neither the Company nor Schenck asks the Commission to defer Schenck's pay claim to the contractual arbitration process. Nevertheless, the reason the deferral process was just referenced is because Schenck asks us to be the de facto arbitrator and rule on the merits of his pay claim using the CBA as the vehicle to do that. Thus, he wants us to ignore the contractual arbitration process. Additionally, he wants us to interpret the CBA regardless of whether the Company and the Union want that to happen. That is problematic because that is not how Sec. 111.06 (1)(f) has historically been interpreted and applied by the Commission, to wit, to allow any private sector employee who is covered by a CBA to file a complaint with the Commission and have us interpret the CBA independent of whether the Company and the Union want that to happen. After researching the Commission's case law, I could not find any cases where the Commission invoked its jurisdiction and addressed the merits of a breach of contract claim under similar circumstances.

Building on that premise, in this case there are three reasons why the Commission will not assert its statutory complaint jurisdiction over Schenck's breach of contract claim and rule on its merits.

Here is the first reason. The parties to that CBA did not agree to have the Commission be the arbitrator/decision-maker and interpret their CBA; instead, they agreed to a process where they would select their arbitrator from a panel of FMCS arbitrators. That is the typical private sector arbitration provision language. If the Commission were to act as the de facto arbitrator and decide the merits of Schenck's pay claim under the CBA, that would deprive the Company of their contractual right to pick their own arbitrator. Additionally, the other named party to the CBA (i.e., the Union) is entitled to weigh in on whether they want the Commission to interpret and apply the CBA. However, Schenck did not name them as a party to his complaint, so they did not file any submissions in this matter.

The second problem with Schenck's attempt to have the Commission arbitrate his claim is that the CBA is between the Company and the Steelworkers Union, not the Company and Schenck. As already noted, the Steelworkers Union is not a party to this case, nor is it seeking to invoke

arbitration of Schenck's wage claim. While Schenck wants to invoke arbitration on his own volition without the Union's involvement and/or consent, he cannot do that. That is because under this CBA, individual employees do not have the right to invoke arbitration without the Union's express involvement and/or consent.

The third problem with the Commission invoking its statutory complaint jurisdiction to address the merits of Schenck's pay claim is that the record conclusively demonstrates that the pay claim Schenck is raising in the instant complaint is the very same claim that was raised in the Union's March 2018 grievance. After that grievance was filed, it was processed through the contractual grievance procedure. While Schenck objects to the amount of time that the parties spent processing his grievance, it is not uncommon in labor relations for grievances to get bogged down and not move quickly, particularly when the topic is a difficult one for the parties. Additionally, the record shows that the Schenck grievance was then discussed in the parties' ongoing collective bargaining. Once again, that is also a common occurrence in labor relations (i.e., to discuss unsettled grievances in bargaining). Sometime during bargaining the Union dropped the Schenck grievance. As previously noted, the Union is not a named party in this matter and, as a result, did not file any submissions explaining why it dropped the Schenck grievance. Nevertheless, it can be inferred from Schenck's own statement in his submission that the reason the Union dropped his grievance was to get a different benefit for its members. Such trade-offs occur all the time in collective bargaining and are an inherent part of the bargaining process. Sometimes when grievances are dropped and/or settled, there is a formal settlement agreement that is drafted and signed. Not always though. Sometimes a grievance is simply dropped, and the parties do not document in writing why that happened. Either way, when a grievance is dropped by the Union it is deemed to be settled and resolved. A grievance that is deemed settled and resolved can only be resurrected with the other side's consent. In this case, it is apparent that the Company opposes Schenck's attempt to resurrect a pay claim that the Union previously dropped, and the Company rightly considered settled and resolved. If Schenck were successful in resurrecting his pay claim under these circumstances and then have the Commission adjudicate its merits outside the contractual enforcement mechanism specified in the CBA, that would undermine both the contractual grievance procedure and the CBA as a whole. Additionally, it would destabilize labor relations between the Union and the Company as neither party would be able to retain confidence that their bargained for exchanges are the final say on such matters.

While there are some situations where the Commission will assert its statutory complaint jurisdiction and consider the merits of breach of contract claims, none of those situations is alleged to be present here. One such situation is where the employee alleges the Union denied him the duty of fair representation. In this case, it can fairly be surmised that Schenck was dissatisfied with how the Union processed his grievance. Nonetheless, Schenck did not raise such a claim in his complaint and did not join the Union as a Respondent. Under these circumstances, the Commission will not assert its statutory complaint jurisdiction over the breach of contract claim raised here.

Accordingly, for the reasons referenced above, the examiner declines to invoke the Commission's jurisdiction to review the merits of Schenck's pay claim under the CBA. The complaint against the Company has therefore been dismissed.

Dated at the City of Madison, Wisconsin, this 21st day of July 2021.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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Raleigh Jones, Examiner