

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

ROBIN J. HAFFNER, Complainant,

vs.

CITY OF NEW RICHMOND, Respondent.

Case ID: 657.0000

Case Type: COMP_MP

DECISION NO. 39954-A

Appearances:

Stephen L. Weld and Justin Andrews, Attorneys, Weld Riley, S.C., 3624 Oakwood Hills Parkway, Eau Claire, Wisconsin, appearing on behalf of Robin Haffner.

Jerilyn Jacobs, Attorney, Crivello Carlson, S.C., 7 South Dewey Street, Suite 120, Eau Claire, Wisconsin, appearing on behalf of the City of New Richmond.

ORDER DISMISSING COMPLAINT

On June 16, 2023, Robin Haffner filed a complaint with the Wisconsin Employment Relations Commission asserting that the City of New Richmond had committed a prohibited practice within the meaning of Section 111.70(3)(a)1. of the Municipal Employment Relations Act (MERA) by seeking to discipline him in whole or in part because he allegedly engaged in activity protected by Section 111.70(2) of MERA.

The Commission appointed Peter G. Davis as Examiner in the matter.

On October 10, 2023, the City filed an Answer and Affirmative Defenses, and the complaint was scheduled to be heard October 24 and 25, 2023. Prior to the hearing, the Examiner raised the issue of whether the Commission could proceed to hear and decide the matter citing *City of Madison v. DWD*, 262 Wis. 2d 652 (2003). The hearing was postponed, and the parties thereafter filed written argument. The record was closed on December 19, 2023, when Haffner advised the Examiner that the City of New Richmond Police and Fire Commission (PFC) had terminated his employment and that he intended to appeal the PFC decision to circuit court.

Having considered the matter, the Examiner is persuaded that the Commission is precluded from proceeding.

NOW, THEREFORE, it is

ORDERED

The complaint is dismissed.

Issued at Madison, Wisconsin, this 13th day of February 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Hearing Examiner

MEMORANDUM ACCOMPANYING ORDER DISMISSING COMPLAINT

In his June 16, 2023 complaint, Haffner asserts that he is a paid on call firefighter employed by the City of New Richmond who was placed on administrative leave in September 2021. In November 2021 and February 2022, Haffner alleges that he engaged in activity protected by the Municipal Employment Relations Act and that the City illegally retaliated against him in November 2022 by filing charges with the City of New Richmond Police and Fire Commission (PFC) seeking his termination.

By way of remedy, Haffner asked that he be returned to duty and that the City and PFC be ordered not to proceed with the November 2022 charges.

In *City of Janesville v. WERC*, 193 Wis. 2d 492 (1995), the Court of Appeals concluded that a union did not have the right to bargain a contractual clause that would allow an employee disciplined pursuant to the provisions of Wis. Stat. § 62.13 to seek arbitral review. The Court stated in part:

. . . the PFC not only has the ultimate authority to suspend employees and the exclusive authority to reduce in rank and remove subordinates, it is also expressly charged with determining whether the charges filed against a subordinate should be sustained at a public evidentiary hearing. *See* § 62.13(5)(d), STATS. It is inconsistent with that statutory charge to permit a subordinate who is dissatisfied with a PFC decision to seek arbitration of essentially the same issue decided by the PFC. This is not a harmonization of the Association's proposal with the PFC's statutory authority. Rather, under the Association's proposal, the PFC's order, which under § 62.13(5)(i), Stats., is "final and conclusive" unless reversed by the circuit court, becomes meaningless.

In *City of Madison v. DWD*, 262 Wis. 2d 652 (2003), the Wisconsin Supreme Court held:

The issue in this case is whether a firefighter who is terminated from city service after a "just cause" hearing before a police and fire commission (PFC) pursuant to Wis. Stat. § 62.13(5)(em) (1997-98) may pursue a discrimination complaint regarding the termination before the Department of Workforce Development (DWD) under the Wisconsin Fair Employment Act (WFEA).

¶ 2. Disciplinary terminations of city firefighters are imposed and reviewed pursuant to the procedures established in Wis. Stat. § 62.13(5). The statutory procedure requires the PFC to determine whether any proposed disciplinary termination is supported by just cause, which includes a determination of whether the rule or order allegedly violated by the firefighter is reasonable and is being applied without discrimination. Wis. Stat. § 62.13(5)(em)2. and 6. Any termination sustained by the PFC under Wis. Stat. § 62.13(5)(em) and (f) is subject only to judicial review in circuit court pursuant to Wis. Stat. § 62.13(5)(i), or in certain circumstances by common law certiorari. Accordingly, any claim that a disciplinary

termination is discriminatory under the WFEA must be raised before the PFC, the agency with exclusive statutory authority under Wis. Stat. § 62.13(5) to review disciplinary actions against firefighters. The DWD may not take jurisdiction over a WFEA complaint arising out of a decision of a PFC to terminate a firefighter.

In its decision, the Court specifically rejected the analysis brought forward by Haffner as to the impact of *Byers v. LIRC*, 208 Wis. 2d 388 (1997).

Applying the Court's holding to the instant matter, I conclude that the WERC can not take jurisdiction over Haffner's complaint that the City of Richmond was seeking to terminate his employment using the procedures established in Wis. Stats. § 62.13(5). I further conclude that Haffner was obligated to raise before the PFC any claim that the City was motivated by hostility toward any alleged activity protected by the Municipal Employment Relations Act (MERA).¹ In so holding, I necessarily find that the "just cause" obligation of the PFC to determine whether there was any "discrimination" when acting on a termination includes rights protected by MERA just as the Court in *Madison* concluded it includes rights protected by WFEA.

The record reflects that Haffner intends to seek circuit court review of the PFC decision. As reflected in the holdings in both *Janesville* and *Madison*, such an appeal is his exclusive recourse. Proceeding before the WERC sets up an "irreconcilable conflict" the courts have prohibited.

Given the forgoing, the complaint is dismissed.²

¹Haffner points out that the original charges of misconduct filed with the PFC included at least some of the activity he now relies upon as protected by MERA and that those charges were ultimately withdrawn and thus not affirmatively considered by the PFC. However, the fact that said conduct was not a basis for PFC action one way or the other does not diminish Haffner's affirmative obligation to have raised that MERA claim as part of his defense before the PFC.

²I acknowledge that to a large extent, I have viewed this matter thru the pragmatic lens of where things sat once briefing was completed in mid-December 2023 (proceedings before the PFC were apparently completed and the parties were awaiting a PFC decision) rather than where things sat in mid-June 2023 when the complaint was filed (apparently proceedings before the PFC had not yet begun). However, just as I believe the WERC cannot proceed now (with the potential for a remedial outcome that would clash with that reached by the PFC or the "final and conclusive" review decision of a circuit court), it seems equally clear that WERC could not interfere with Wis. Stats. § 62.13 proceedings where, as here, charges had been filed and the PFC's jurisdiction invoked.

It should be noted that there are some forms of discipline (reprimands, denial of trades for fire fighters are examples) as to which the PFC has no jurisdiction and thus WERC would be free to proceed as to an alleged retaliation prohibited practice. It is arguable that being placed on administrative leave would also qualify as discipline. However, pursuit of that contention as to Haffner's placement on administrative leave in September 2021 is time barred.

Issued at the City of Madison, Wisconsin, this 13th day of February 2024.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Peter G. Davis, Hearing Examiner