STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

WISCONSIN LAW ENFORCEMENT ASSOCIATION on behalf of itself, its members including STEVEN J. MAEDER, and other similarly situated employees, Complainants.

vs.

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, WISCONSIN STATE EMPLOYEES UNION COUNCIL 24; and STATE OF WISCONSIN, Respondents.

Case 668
No. 64618
PP(S)-352

Decision No. 31397-A

Appearances:

Sally A. Stix, Attorney, Law Offices of Sally A. Stix, 700 Rayovac Drive, Suite 117, Madison, Wisconsin 53711, appearing on behalf of the Wisconsin Law Enforcement Association.

Kurt C. Kobelt, Attorney, Lawton & Cates, S.C., Ten East Doty Street, Suite 400, P.O. Box 2965, Madison, Wisconsin 53701-2965, appearing on behalf of AFSCME Council 24, Wisconsin State Employees Union, AFL-CIO.

David J. Vergeront, Chief Legal Counsel, Office of State Employment Relations, State of Wisconsin, 101 East Wilson Street, Fourth Floor, P.O. Box 7855, Madison, Wisconsin 53707-7855, on behalf of the State of Wisconsin.

EXAMINER'S ORDER CONCERNING PRE-HEARING MOTIONS

On March 17, 2005, the above Complainants (WLEA) filed a complaint alleging that Respondent WSEU had committed unfair labor practices within the meaning of Sees. 111.84(2)(a), (b), (d) and 111.84 (3) of the State Employment Labor Relations Act (SELRA) and that Respondent State had committed unfair labor practices within the meaning of Secs. 111.84(l)(a), (b), (c), (d) and (e) of SELRA.

On May 25, 2005, WLEA filed a motion to amend the complaint to include an Exhibit 2 consisting of a list of grievances dropped by WSEU.

On June 7, 2005, Respondent WSEU filed a motion to dismiss the complaint on the grounds that it fails to allege facts which, if proven, would constitute violations of Secs. 111.84(a), (b), (d) and 111.84(3), Stats.

WSEU and WLEA submitted written arguments concerning WSEU's motion to dismiss, the last of which was received by the Examiner on June 30, 2005, at which time the motion became ready for decision

On July 12, 2005, the Commission appointed the undersigned as hearing examiner in the matter.

The Examiner has considered the WLEA motion to amend and the WSEU motion to dismiss and the arguments concerning the latter. The Examiner now issues the following

ORDER

1. The motion to amend the complaint filed by WLEA on May 25, 2005, is granted.

2. The motion to dismiss filed by WSEU on June 7, 2005, is denied.

3. WLEA's request for an order, requiring WSEU to pay WLEA's attorneys fees and costs relating to WSEU's motion to dismiss, is denied.

Dated at Shorewood, Wisconsin, this 14th day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /s/

Marshall L. Gratz, Examiner

STATE OF WISCONSIN

MEMORANDUM ACCOMPANYING EXAMINER'S ORDER CONCERNING PRE-HEARING MOTIONS

BACKGROUND

In the complaint, WLEA alleges, in pertinent part, as follows:

[facts giving rise to complaint:]

On or about March 2, 2005, AFSCME, WSEU notified the State of its withdrawal of any and all grievances for the law enforcement ("LE") unit. WLEA was not certified as representative for the LE bargaining unit at the time of Council 24's withdrawal. Complainant Maeder and others had grievance proceedings terminated regarding discipline, termination and other matters. On March 7, 2005, the State notified WLEA, because the "grievances and appeals were filed under the WSEU contract, the grievances and appeals are dropped." Further, in AFSCME, WSEU's notice to the State, it unilaterally canceled without 30-days notice the extended contract with the State of Wisconsin which pertained to the LE bargaining unit, refusing representation to LE employees despite the lack of a new certified representative and the new representation assumption date which was to begin at the expiration of AFSCME, WSEU and the State's contract. (See, Ex. 1, attached). [attachment omitted].

[statutory sections alleged violated:]

Secs. 111.84(2)(a), (b), (d) and 111.84(3) by AFSCME, WSEU; and

Secs. 111.84(l)(a), (b), (c), (d), (e) by the State of Wisconsin.

[relief requested:]

(1) All relief sought by AFSCME, WSEU as articulated in the original grievances and a finding that AFSCME, WSEU and the State committed unfair labor practices.

(2) In the alternative, a requirement that AFSCME, WSEU act as LE employees' representative for all unlawfully withdrawn grievances and AFSCME, WSEU and the State be ordered to continue the grievance/arbitration process or an order requiring AFSCME, WSEU to transfer all pending grievances to WLEA for processing and an order that the State accept the grievances for processing.

(3) Further, AFSCME, WSEU be ordered to immediately reinstate the discontinued dental insurance coverage to LE unit members and pay all out-of-pocket expenses any LE bargaining unit member incurred due to the unlawful cancellation.

(4) Attorneys' fees and costs for bringing action.

Exhibit 1 attached to the complaint purports to be a WSEU-State extension agreement signed on June 30, 2003, to the effect that the WSEU-State collective bargaining agreement effective May 17, 2003, through June 30, 2003, was extended effective July 1, 2003, subject to termination by either party upon thirty days written notice.

On May 25, 2005, WLEA filed a motion to amend the complaint to include Exhibit 2 consisting of what WLEA asserts is a list of the grievances allegedly dropped by WSEU. Neither Respondent responded in any way to that routine motion, and the Examiner has granted it as a part of this Order.

In its June 7, 2005, motion to dismiss, WSEU requests that the complaint be dismissed because "Complainants have failed to allege or establish violations of Sees. 111.84(2)(a), (b), (d) and 111.84(3), Stats."

DISCUSSION

WSEU seeks dismissal of the portions of the complaint alleging WSEU unfair labor practices, on the grounds that the facts alleged in the complaint, if proven, could not constitute a basis for concluding that WSEU committed any of the unfair labor practices alleged. WLEA asserts that the complaint sets forth facts constituting viable claims that WSEU violated its SELRA duty of fair representation by various acts and omissions alleged in the complaint, and it requests that the motion be denied with an order that WSEU pay WLEA's attorneys fees and costs relating to the motion. The State submitted no arguments regarding the motion.

WSEU cites federal private sector case law [1] on what it asserts are first impression issues for the WERC, for the propositions that when an exclusive representative disclaims further interest in representing a bargaining unit, all pending grievances are extinguished; that, absent collusion between unions not present here, an exclusive representative is entitled to disclaim interest at any time; that WSEU was therefore entitled to do so without providing any notice when it lost the decertification election and decided not to challenge that result; that the existence of the June 30, 2003, contract extension agreement did not preclude WSEU from

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[1] WSEU cites, among others, JOINT COUNCIL OP TEAMSTERS, No. 42 (GRINELL FIRE PROTECTION SYSTEMS COMPANY, INC.), 235 NLRB 1168, 1169 (1978) (APPb SUB NOM. DYCUS V. NLRB, 615 F.2D 820, 826 N.2 (CA 9, 1980); ARIZONA PORTLAND CEMENT CO., 302 NLRB 36, 37 (1991); PRODUCTION AND MAINTENANCE LOCAL UNION 101, 329 NLRB 247, 249 (1999); AMERICAN SUNROOF, 243 NLRB 1128, 1129-30 (1979); DYCUS, SUPRA, AT 826 N.2; AND TEAMSTERS V. FLIGHT ATTENDANTS, 864 F.2D 173 (CA DC, 1988).

disclaiming interest; that once WSEU disclaimed interest, the contract extension agreement was null and void, all grievances relating to WSEU-State agreements were extinguished by operation of law, and the employees' decision to certify WLEA as their representative took effect by operation of law with the later WERC certification of WLEA merely serving as an after-the-fact confirmation; and that, in any event, after a labor organization is decertified, the employer is not obligated to arbitrate grievances filed prior to the decertification. WSEU further suggests WSEU's withdrawal of the grievances has not left WLEA and the affected employees without recourse because WLEA can, if it chooses, both bargain with the State for reconsideration of the grievances, pursue a violation of contract unfair labor practice complaint against the State under Sec. 111.84(1)(e), Stars., or pursue Sec. 230.44, Stars., appeals regarding those of the grievances subject to that process.

WLEA, primarily citing federal and other non-Wisconsin case law [2], asserts that in some circumstances a decertified union that is signatory to a collective bargaining agreement may retain the right to enforce claims that arose under the contract before it expired and before the union was decertified; that the grievances at issue would not have been extinguished by the outcome of the election, by WSEU's disclaimer of interest, by the termination or expiration of the extension agreement, or by the WERC's later certification of WLEA; and that, in any event, a union is entitled to disclaim interest only if the disclaimer is made in good faith, unlike WSEU's disclaimer taken as a retaliatory action prior to the WERC's certification of the election results. WLEA further asserts that Sec. 111.83(6), Stars., when read together with Sec. 111.92(3), Stars., conferred on WSEU the responsibility to represent the LE unit through the end of the biennium ending on June 30, 2005, and specifically provides that a newly elected representative takes over only upon expiration of the prior agreement, thereby preventing a new representative from taking over immediately after a disclaimer of interest by the prior representative. WLEA further argues that WSEU's claimed right to abrogate its duties within the statutorily defined period of representation must be rejected as inconsistent with the expressed statutory policy favoring stability and continuity in the State's relations with its employees and their unions. Further, WLEA suggests that if WSEU did not want to fulfill its responsibilities to the LE unit after losing the election, it could have delegated them to WLEA. WLEA concludes that by failing to follow one or the other of those courses, WSEU violated its duty of fair representation under SELRA.

As WLEA argues, it is well-settled Commission case law that the expiration or termination of the agreement under which a grievance arises does not extinguish the grievance or relieve the employer of any obligation it may have had under the agreement to process or arbitrate. the grievance involved. SEE, E.G., RACINE UNIFIED SCHOOL DISTRICT, DEC No. 24272-B (WERC, 3/1/88). In that case, the Commission stated,

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[1] WLEA cites, among others, AUTOMOBILE WORKERS V. TELEX COMPUTER PRODUCTS, 816 F.2D 519, 522-23 (CA 10, 1987); QUINN V. POLICE OFFICERS LABOR COUNCIL, 456 MICH. 478, 572 N.W.2D 641 (1998); UNITED STATES GYPSUM Co. V. STEELWORKERS, 384 F2D 38 (CA 5, 1967); and CHICAGO TRUCK DRIVERS LOCAL 101 (BAKE-LINE PRODUCTS), 329 NLRB 247, 248 (1999); ARIZONA PORTLAND CEMENT Co., 302 NLRB 36, 37 (1991).

> While we have affirmed the Examiner's Conclusion of Law that the District acted lawfully in refusing to arbitrate the nine grievances deemed to have arisen after expiration, we are not holding herein that the expiration of the agreement relieved the District of the obligation to arbitrate grievances filed after expiration but concerning events arising during the term of the agreement. On the contrary, the Sec. 111.70(3)(a)5, Stars., duty not to violate an agreement to arbitrate is not extinguished--as regards a grievance concerning pre-expiration events--by the fact that the agreement expired before the grievance was initiated and/or fully processed through the grievance and arbitration procedures. In other words, the fact that a grievance arising prior to expiration has not been initiated or fully processed through contractual grievance and arbitration procedures by the time of expiration does not, alone, extinguish the. contractual duty to complete those processes as to such grievance. SEE, E.G., ALMA CENTER SCHOOLS, DEC. No. 11628 (WERC, 7/73) ("The fact that the 1971-72 agreement has expired does not excuse Respondents from arbitrating a dispute which arose during the term of said agreement." Id. at 8); and ABBOTSFORD SCHOOLS, DEC. No. 11202-A (3/73) (The fact that the agreement has now expired does not excuse the Respondents from their duty to remedy any breaches of the agreement arising during the term of the agreement. Id. at 8.), AFF'D BY OPERATION OF LAW, DEC. No. 11202-B (WERC, 5/73). Each of those cases cited with approval this agency's private sector decisions in SAFEWAY STORES, DEC No. 6883 (WERB, 9/64) (employer ordered to arbitrate grievance filed after expiration because "the alleged contractual violation occurred during the term of the agreement." ID. at 6.) and KROGER COMPANY, DEC. No. 7563-A (WERB, 9/66)(to the same effect.)

RACINE, suPRA, DEC. No. 24272-B at 7-8. Section 111.84(1)(e), of SELRA parallels the above-referenced Sec. 111.70(3)(a)5 of the Municipal Employment Relations Act (MERA).

Whereas the parties' arguments otherwise rely primarily on private sector decisional principles developed under other than Wisconsin statutes, the Examiner finds it preferable to apply public sector decisional principles developed by the Commission under MERA.

Specifically, the Examiner finds it appropriate to draw guidance from the Commission's long held view in public sector cases under MERA that,

> Where the Commission conducts an election during the term of a collective bargaining agreement and the employees select a bargaining representative other than the one previously recognized in the agreement, the Commission's policy is that the new representative "will be obligated to enforce and administer the substantive provisions therein inuring to the benefit of the employes covered by the ... agreement. Any provision which runs to the benefit of the former bargaining agent will be considered extinguished and unenforceable."

GATEWAY DISTRICT BOARD OF VTAE, DEC. No. 20209-B, (CROWLEY, 7/83) at 7, AFF'D -B (WERC, 8/84), AFF'D (CIRCT KENOSHA, 11/14/85), CITING CITY OF GREEN BAY, DEC. No. 6558 (WERB, 11/83) AND MERTON SCHOOLS, DEC. No. 12828 (WERC, 6/74). In GATEWAY, the Commission affirmed the Examiner's conclusions that the new representative's responsibility to enforce and administer the non-extinguished agreement provisions began as of the date of the WERC's certification of the new representative as exclusive representative. SEE, GATEWAY, SUPRA, DEC. No. 20209-A AT 4, AND DEC. No. 20209-B AT 6.

The GATEWAY decision provides persuasive guidance in several respects where, as here, the Commission conducts an election under SELRA during the term of an extension agreement' and the employees select a bargaining representative other than the one previously recognized in the agreement. ° First, the Commission considered it to be the new representative's responsibility, rather than the old representative's, to enforce and administer the non-extinguished portions of the existing agreement. Second, it was the date of the WERC's certification of the new representative that marked the point after which contract enforcement and administration became the new representative's responsibility. Third, neither the election result nor the certification of the new representative had the effect of extinguishing or rendering unenforceable provisions of the unexpired agreement inuring to the benefit of the employees covered by the agreement. And fourth, the only provisions of the existing agreement that were extinguished by operation of law and unenforceable were those which run to the benefit of the former bargaining agent such as union security provisions.

Applying the above principles from the RACINE and GATEWAY cases, together, to the facts alleged in the instant complaint, neither the expiration nor termination of the June 30, 2003, extension agreement nor the expiration of any prior State-WSEU agreement would have extinguished grievances arising under those agreements or relieved the State of any obligation it may have had under those agreements to process or arbitrate the grievances involved. It became WLEA's responsibility, rather than WSEU's, to enforce and administer the non-extinguished portions of those agreements, as of the date of the WERC's certification of WLEA as the new representative. Neither the election result nor the certification of the new representative had the effect of extinguishing or rendering unenforceable provisions of those agreements inuring to the benefit of the employees covered by the agreements. (In the Examiner's opinion, agreements to process and arbitrate grievances are clearly provisions inuring to the benefit of the employees covered by the agreement, as regards grievances relating to substantive agreement provisions inuring to the benefit of the covered employees. ')

' In contrast, as noted later in this DISCUSSION, where the Commission conducts an election under SELRA during the term of other than an extension agreement, specific language in Sec. 111.83(6), Stars., would become applicable, SEE, STATE OF WISCONSIN, DEC. No. 31195 (WERC, 12/04).

' The Examiner does not have occasion on the facts of this case to offer an opinion on the decisional principles applicable where an exclusive representative is decertified and no new representative is selected.

' The grievance list added to the complaint by amendment does not permit the Examiner to determine which, if any, of the grievances listed relate to substantive agreement provisions inuring to the benefit of the former bargaining agent. For that reason, and because the complaint alleges that the grievances involved relate to "discipline, termination and other matters," the Examiner certainly cannot conclude at this stage of the proceedings

And finally, the only provisions of the WSEU-State agreements that were extinguished by operation of law and unenforceable were those which run to the benefit of the former bargaining agent such as union security provisions.

The Examiner rejects WLEA's contention that Sec. 111.83(6), Slats., of SELRA, would require WSEU to continue to serve as exclusive representative of the LE unit until the fiscal year and biennium ended on June 30, 2005 and/or that that Section prevented WLEA from taking over representation of the LE unit prior to that date. To the contrary in STATE OF WISCONSIN, DEC. No. 31195 (WERC, 12/04), suPRA, the Commission held that Sec. 111.83(6), Slats., only establishes procedures applicable where an "actual agreement" is in effect, and that an extension agreement does not constitute such an "actual agreement." ID. at 4-6. Accordingly, the portion of Sec. 111.83(6), Slats., stating, "[i]f a majority of the employees in the collective bargaining unit vote for a change or discontinuance of representation by any named representative, the decision takes effect upon expiration of any existing collective bargaining agreement between the employer and the existing representative," is not applicable where, as here, there is only an extension agreement but no "actual agreement" in force.

The Examiner also rejects WSEU's contention that WSEU's disclaimer of interest prior to the WERC's certification of WLEA as the newly-elected representative extinguished pending grievances by operation of law. The Examiner finds it contrary to the purposes served by the Racine and Gateway principles noted above and contrary to the underlying purposes of SELRA " for the defeated and outgoing representative's decision not to further represent the employees for the period of time after the election and before the WERC certification of a newly elected representative to have the effect of extinguishing by operation of law what would otherwise remain viable contractually-enforceable substantive claims affecting the employees involved.

Furthermore, assuming, without deciding, both that WSEU was acting within its rights to disclaim interest in further representing the LE unit during the period of time prior to the WERC's certification of WLEA as the new representative, and that WSEU's disclaimer of interest relieved it thereafter of its duty of fair representation of the LE unit, the Examiner nonetheless concludes that the complaint states a viable SELRA claim against WSEU. The complaint alleges that WSEU disclaimed interest by the same letter in which it withdrew all grievances. If the disclaimer is deemed to take effect the instant after the grievances were withdrawn, then WSEU would have remained subject to the duty to fairly represent the LE unit when it withdrew the grievances and the complaint would constitute a viable

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that none of the grievances referred to in the complaint relate to substantive agreement provisions inuring to the benefit of the covered employees.

' The SELRA " Declaration of Policy" emphasizes the values of "[o]rderly and constructive employment relations for employees and the efficient administration of state government", and the importance of "providing a convenient, expeditious and impartial tribunal in which [the interests of the public, the employee and the employer] may have their respective rights determined." Secs. 111.80(2) and (4), Suits.

Sec. 111.84(2)(a), Stars., claim that WSEU's withdrawal of the grievances violated that duty. If the disclaimer is deemed to take effect at the same time or before the grievances were withdrawn, then WSEU would have been purporting to withdraw grievances it lacked the representational authority to withdraw, and the complaint would constitute a viable Sec. 111.84(3), Stats., claim that WSEU improperly caused the State to commit alleged unfair labor practices consisting of improperly refusing to further process the grievances.

The Examiner also rejects any WSEU contention that the complaint against WSEU is somehow rendered non-viable because WLEA may have non-contractual alternative means of pursuing the grievances at the bargaining table or through statutory proceedings. The complaint could result in a determination that WSEU has unlawfully deprived WLEA of the right to pursue some or all of those grievances through the contractual grievance procedure. The availability of bargaining table or statutory enforcement alternatives does not persuasively undercut the viability of such a claim against WSEU, generally. Especially so when the limitations of and possible State defenses to those alternative enforcement means are considered.

In sum, the Examiner concludes that, under SELRA and in the circumstances alleged in the instant complaint, grievances concerning events or occurrences during the term of the June 30, 2003, extension agreement or during the term of earlier agreements between the State and WSEU would not have been extinguished by the expiration or termination of the agreement(s) under which those grievances arose, or by the outcome of the election, or by WSEU's disclaimer of interest in further representation of the LE unit, or by the WERC's later certification of WLEA as representative of the LE unit. Thus, but for WSEU's withdrawal of the grievances, some or all of those grievances would have had continued viability as contract grievances the processing of which became WLEA's responsibility when WERC certified WLEA as representative. The complaint asserts that by its wholesale withdrawal of the grievances in the extant circumstances, WSEU either violated its SELRA duty of fair representation with respect to those grievances or improperly purported to withdraw those grievances when WSEU was without the authority to do so, causing the State to allegedly commit unfair labor practices by refusing to continue to process those grievances. While under the foregoingg analysis WLEA may not be entitled to an order requiring WSEU to provide or pay for the continued processing of the grievances in question, WSEU has not persuasively shown that no relief of any kind against WSEU (e.g., declarative relief, notice posting, etc.) could be granted under any interpretation of the facts alleged in the complaint.

For all of those reasons, the Examiner is not persuaded that the complaint fails to allege or establish any violations of Sec. 111.84(a), (b), (d) and 111.84(3), Stats.

Assuming, without deciding, that the WERC has the authority to grant WLEA's request that WSEU be ordered to pay WLEA's attorneys fees and costs relating to the motion, the Examiner fords no basis for such an order in this case because the motion presented legitimate questions of first impression under SELRA.

Accordingly, the Examiner has denied both WSEU's motion to dismiss and WLEA's request for attorneys fees and costs.

Dated at Shorewood, Wisconsin, this 14th day of July, 2005.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

Marshall L. Gratz /a/
Marshall L. Gratz, Examiner

MLG/gjc
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