

FILED

04-27-2023

Clerk of Circuit Court

Racine County

2023CV000483

Honorable Mark F. Nielsen

Branch 4

STATE OF WISCONSIN : CIRCUIT COURT : RACINE COUNTY

THERESA JAKALA

7851 45th Avenue

Kenosha, WI 53142

ANGELA KENNEDY

2535 Green Haze Avenue

Mount Pleasant, WI 53406

NANCY WOLF

1223 Marshall Avenue

South Milwaukee, WI 53172

Plaintiffs,

vs.

RACINE UNIFIED SCHOOL DISTRICT
BOARD OF EDUCATION and the RACINE,
UNIFIED SCHOOL DISTRICT
3109 Mt. Pleasant St.
Racine, WI 53404,

Case No. ____ CV ____

Case Classification Codes:

30701 (Declaratory Judgment)

30704 (Other Injunction/Restraining
Order)

Defendants.

SUMMONS

THE STATE OF WISCONSIN

To each person named above as a Defendant:

You are hereby notified that the Plaintiffs named above have filed a lawsuit or other legal action against you. The Complaint, which is attached, states the nature and basis of the legal action.

Within 20 days of receiving this summons, you must respond with a written answer, as that term is used in chapter 802 of the Wisconsin Statutes, to the Complaint.

The court may reject or disregard an answer that does not follow the requirements of the statutes. The answer must be sent or delivered to the court, whose address is: Racine Clerk of Circuit Courts, 730 Wisconsin Avenue, Racine, Wisconsin 53403 and to Rebecca Ferber Osborn and Christina M. Ripley, Plaintiff's attorneys, whose addresses are: Rebecca Ferber Osborn, Wisconsin Education Association Council, 13805 West Burleigh Road, Suite 200, Brookfield, Wisconsin 53005-3058, and Christina M. Ripley, Wisconsin Education Association Council, 33 Nob Hill Road, Post Office Box 8003, Madison, Wisconsin 53708-8003. You may have an attorney help or represent you.

If you do not provide a proper answer within 20 days, the court may grant judgment against you for the award of money or other legal action requested in the Complaint, and you may lose your right to object to anything that is or may be incorrect in the Complaint. A judgment may be enforced as provided by law. A judgment awarding money may become a lien against any real estate you own now or in the future and may also be enforced by garnishment or seizure of property.

Dated April 27, 2023

Electronically signed by: Rebecca Ferber Osborn

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COMPLAINT

Plaintiffs, Theresa Jakala, Angela Kennedy, and Nancy Wolf, by and through their attorneys, Rebecca Ferber Osborn and Christina M. Ripley of the Wisconsin Education Association Council, allege:

PARTIES

1. Plaintiff, Theresa Jakala resides in Kenosha County at 7851 45th Avenue, Kenosha, WI 53142. She is a teacher for the Racine Unified School District ("District").

2. Plaintiff, Angela Kennedy, resides in Racine County at 2535 Green Haze Avenue, Mount Pleasant, Wisconsin 53406. She is a teacher for the Racine Unified School District ("District").

3. Plaintiff, Nancy Wolf resides in Milwaukee County at 1223 Marshall Avenue, South Milwaukee, Wisconsin 53172. She is a teacher for the Racine Unified School District ("District").

4. Defendant Racine Unified School District Board of Education (hereinafter "Board"), has as its President Jane Barbian, is located in Racine County, 3109 Mt. Pleasant Street, Racine, WI 53404, and is a public school board organized and operating under the authority of Wis. Stat. ch. 115, 118 and 120.

5. Defendant Racine Unified School District (hereinafter "District"), is a K-12 public school district organized and operating under the authority of Wis. Stat. ch. 115, 118 and 120. Its principal place of business is located in Racine County, 3109 Mt. Pleasant Street, Racine, WI 53404. Eric Gallien is the District's Superintendent.

JURISDICTION AND VENUE

6. This is an action for declaratory judgment pursuant to Wis. Stat. § 806.04 and for permanent and temporary injunctive relief pursuant to Wis. Stat. §§ 813.01 and 813.02.

7. The purposes of this action are as follows:

- a. to determine whether Defendants fulfilled their obligations under Wis. Stat. § 66.0509(1m)(d)2 to provide Plaintiffs a hearing before an impartial hearing officer (IHO) pursuant to its grievance procedure,
- b. to decide whether Defendants may impose as a requirement of its grievance procedure that a grievance state a violation of the Employee Handbook,
- c. to enter a permanent injunction preventing Defendants from retaining Douglas Witte to serve as the IHO in Plaintiffs' grievances with Defendants, and
- d. to enter a permanent injunction preventing Defendants from imposing as a requirement of its grievance procedure that a grievance state a violation of the Employee Handbook.

8. This Court has subject matter jurisdiction pursuant to Wis. Stat. §§ 806.04, 813.01 and 813.02.

9. This Court has personal jurisdiction over Defendants and venue is properly located before this Court. Defendants reside within this judicial district, the alleged violations for which Plaintiffs seek declaratory and injunctive relief are occurring within this judicial district.

GENERAL ALLEGATIONS

10. Under Wis. Stat. § 66.0509(1m)(c), local governmental units, including school districts, without a civil service system must establish a grievance procedure

containing the following provisions: "1. A grievance procedure that addresses employee terminations. 2. Employee discipline. 3. Workplace safety."

Said grievance procedure must contain the following elements:

1. A written document specifying the process that a grievant and an employer must follow.
2. A hearing before an impartial hearing officer.
3. An appeal process in which the highest level of appeal is the governing body of the local governmental unit.

Wis. Stat. § 66.0509(1m)(d).

11. The IHO step and the Board step are separate and distinct under Wis. Stat. § 66.0509. The impartial hearing officer is to hear the matter from a neutral perspective, without influence, direct or indirect, from either party. On appeal, the Board may then accept or reject this neutral decision.

12. Defendants created a grievance procedure set forth in Section 14 of its Employee Handbook.

a. Section 14.1 provides that the grievance procedure is "to provide for the exclusive internal method for resolving grievances concerning discipline, termination and workplace safety."

b. Section 14.2 defines grievance as "any complaint that arises concerning discipline, termination or workplace safety."

c. The term "workplace safety" is not defined in Section 14.

d. The grievance procedure consists of five steps: 1. Informal Resolution, 2. Written Grievance, 3. Appeal to Office of Human Resources, 4. Appeal to Impartial Hearing Officer and 5. Appeal to Board of Education.

e. Section 14.4.2 provides that the written grievance filed at Step 2 "shall include the facts upon which the grievance is based, the issues involved, the Handbook provision alleged to be violated and the relief sought."

f. Section 14.7 provides group grievances may be filed at Step 3.

13. Employees of the District filed group grievances against the District regarding workplace safety issues.

a. On November 5, 2021, Plaintiff Nancy Wolf along with other affected educators filed a group grievance over the District's failure to provide a safe work environment. The grievance alleges students and staff were harmed physically and emotionally as a result of assaults and fights in the hallways of several schools including, but not limited to, Case High School, Horlick High School, Jerstad-Agerholm School (serving students in kindergarten through eighth grade), Park High School and Schulte Elementary School.

b. On December 20, 2021, Plaintiff Angela Kennedy along with five other educators at Mitchell School (serving students in kindergarten through eighth grade) filed a group grievance over the District's inadequate handling of a situation involving a student bringing a gun and bullet to school.

c. On March 22, 2022, Plaintiff Theresa Jakala and 10 co-workers filed a group grievance after a student fired a gun in the bathroom of Jerstad-Agerholm School (serving students in kindergarten through eighth grade) alleging the District failed to provide a safe work environment and to adequately address the incident after its occurrence.

d. On October 10, 2022, two employees filed a group grievance over the District-level administration's inadequate response following the shooting of a student outside of Case High School during the school day, including, but not limited to, its failure to place nearby West Ridge Elementary School in lockdown.

e. With respect to each of the grievances described in paragraph 13 a-d, above, when asked on the grievance form to identify the provision of the Employee Handbook violated, the grievants responded: "10, 10.1, and all other relevant sections of the handbook. The Public Employee Health and Safety Law, Wis. Stat. § 101.055 and the Safe Place Statute, Wis. Stat § 101.11."

f. Section 10.1 titled "Safety" provides: "The District believes it is important to protect the health, safety and well-being of students and employees. All employees are encouraged to bring apparent safety problems to the attention of the building administrator."

14. The grievances described in paragraph 13 a-d supra, are currently at Step 4 of the grievance procedure which requires a hearing before an IHO.

15. On or about October 31, 2022, the District notified Plaintiffs' representative, Joseph Sexauer, that the Board had selected Attorney Douglas Witte of Boardman and Clark as the District's IHO to hear Plaintiffs' grievances.

16. In a November 1, 2022, email, Sexauer objected to Witte's appointment on behalf of the grievants, including Plaintiffs, on the grounds that Witte is not an impartial decision-maker due to his repeated representation of the District and/or Board since at least the 1990's.

17. On November 1, 2022, Ryan Heiden, the attorney representing the District in the grievances, responded to Sexauer's email of the same date by indicating he believed it was important to respect the Board's decision regarding Witte's selection, given that the issue of Witte's impartiality had already been raised in other workplace grievances in February 2021, and both the Board and Witte determined that Witte was impartial. Ultimately, the grievances that were pending in February 2021 were resolved prior to any hearing before Witte at the IHO step of the process.

18. On November 3, 2022, Board President Jane Barbian responded to Sexauer's November 1, 2022 objection to Witte as IHO by stating, in part, that the Board "did not see any impartiality on his part towards any particular group."

19. On November 8, 2022, Witte declined to recuse himself in response to Plaintiffs' objection.

20. The District raised jurisdictional and remedy issues with respect to Plaintiffs' pending workplace safety grievances. The District maintained that the grievances were not subject to the grievance procedure because they failed to cite a provision of the Employee Handbook breached and because portions of the remedy requested could not be granted by the IHO.

21. On or about November 16, 2022, Witte ordered bifurcation of the pending workplace safety grievances to address the jurisdictional and remedy issues and directed the parties to submit briefs in December 2022.

22. In Plaintiffs' December 14, 2022 brief, they again maintained that the District was required to select another IHO due to Witte's lack of impartiality. Plaintiffs

also argued that the District could not require Plaintiffs to state an Employee Handbook violation within their workplace safety grievances.

23. In a January 17, 2023 decision, Witte refused to recuse himself. He also decided not to deny the pending grievances on jurisdictional/remedy grounds “at this time,” but noted that the “grievances may warrant dismissal if the Grievants have failed to adequately cite a Handbook provision which has been violated and prove a violation of that section.”

24. In a supplemental decision dated March 8, 2023, Witte reiterated that Plaintiffs are required to establish how Section 10 or 10.1 of the District Handbook was violated by the District and constitute a “workplace safety” violation.

COUNT I - REFUSAL TO APPOINT AN IMPARTIAL HEARING OFFICER

25. Plaintiffs incorporate all the allegations set forth in paragraphs 1-24 above as if set forth herein completely

26. Under Wis. Stat. § 806.04(1), (2) and (5), Wisconsin circuit courts have the power to declare rights, status and other legal relations between parties. Further, under Wis. Stat. § 806.04(8), Wisconsin circuit courts have the authority to fashion supplemental relief based on a declaratory judgment whenever necessary and proper.

27. The Board selected Witte as IHO to hear Plaintiffs’ grievances, despite his service as counsel to the District and/or Board in numerous matters dating back to at least the late 1990s and as recently as 2021.

a. Witte has represented the District in more than a dozen matters before the Wisconsin Employment Relations Commission and in court many of which were against the union of which all of Plaintiffs are members.

b. On April 10, 2017, the Board selected Witte to act as its counsel at Step Four of the then-existing Consolidated Grievance Procedure. Under the Consolidated Grievance Procedure in effect on April 10, 2017, Step Three was the IHO step which included the selection of an IHO from a panel provided by the WERC. Step Four of the process provided for an appeal of the IHO decision to the Board which was to be represented and advised by Witte.

c. As recently as 2021, Witte was retained by the Board to conduct employee pre-termination hearings on its behalf and to advise the Board regarding whether to sustain the District administration's recommendation to terminate employees.

28. The Board's selection of an IHO who it has retained as its own counsel for grievance appeals and who it continues to retain to represent it in termination hearings blurs the distinction between the IHO and Board steps of the grievance process, creates an impermissibly high probability of bias, and, at a minimum, creates the appearance of bias.

29. Despite Plaintiffs' requests that their grievances be heard by an impartial officer, the Board has refused to select a hearing officer with the requisite impartiality.

30. Under Wis. Stat. § 66.0509(1m)(d)2, Defendants have a clear and unequivocal duty to create a grievance process that includes a hearing before an

impartial hearing officer, and Plaintiffs have a clear legal right to have their grievances heard by an impartial hearing officer.

31. By appointing Witte, the Defendants have divested Plaintiffs and the other grievants of their right to a hearing before an impartial hearing officer in violation of Wis. Stat. § 66.0509(1m).

32. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to their right to an impartial review of their grievances if this Court permits the hearing to go forward with Witte as IHO.

33. This Court's declaration that Witte lacks the requisite impartiality to act as IHO and that Defendants' appointment of him violates Wis. Stat. § 66.0509 will resolve a dispute between the parties regarding Plaintiffs' and other District employees' right to a hearing before an impartial hearing officer.

COUNT II- DEFINITION OF "WORKPLACE SAFETY"

34. Plaintiffs incorporate all the allegations set forth in paragraphs 1-33 above as if set forth herein completely.

35. Although Wis. Stat. § 66.0509(1m) does not expressly define the term "workplace safety," the statute also does not grant public employers the authority to devise exceptions to "workplace safety" contrary to the term's common meaning. *See Dodge County Professional Employees Local 1323-A, et al. v. Dodge County*, 2014 WI App 8, 352 Wis. 2d 400, 842 N.W.2d 500 (holding the employer was not free to limit the types of terminations that could be grieved under its Chapter 66 grievance process).

36. Despite having a plain statutory duty to process Plaintiffs' workplace safety grievances, Defendants have implemented an impermissibly narrow definition of "workplace safety" by requiring that employees cite a violation of the Employee Handbook, the content of which is exclusively determined by the Board, in order to grieve.

37. Defendants' limiting of the workplace safety issues that may be grieved is designed to shield as many of the workplace safety issues as possible from scrutiny.

38. Wis. Stat. § 66.0509(1m) guarantees Plaintiffs the right to grieve workplace safety issues, such as the District's handling of violent and dangerous incidents in the workplace. Plaintiffs will be forever robbed of this right if Defendants are permitted to exempt from its grievance procedures any and all workplace safety issues that are not expressly covered by a provision of the Employee Handbook that they drafted.

39. Defendants' application of its grievance procedure to require employees to cite a violation of the Employee Handbook in order for their grievances to be processed divests Plaintiffs of their right to have their grievances heard in violation of Wis. Stat. § 66.0509(1m).

40. Plaintiffs have no adequate remedy at law and will suffer irreparable harm to their right to grieve workplace safety concerns if this Court permits the hearings to go forward with the requirement that Plaintiffs establish a violation of the Employee Handbook.

41. This Court's declaration of the invalidity of the District's application of its grievance procedure and Plaintiffs' right to grieve the workplace safety issues they have

raised will resolve a dispute between the parties regarding Plaintiffs' and other District employees' right to grieve workplace safety issues.

RELIEF REQUESTED

WHEREFORE, Plaintiffs respectfully request that this Honorable Court enter judgment in their favor and against Defendants Racine Unified School District Board of Education and Racine Unified School District as follows:

- A. Granting Plaintiffs temporary and permanent injunctive relief enjoining Defendants from proceeding with Plaintiffs' grievances with Douglas Witte as the IHO.
- B. Granting Plaintiffs temporary and permanent injunctive relief enjoining Defendants from imposing as a requirement of their grievance procedure that a grievance state a violation of the Employee Handbook.
- C. Declaring that Defendants have failed to comply with Wis. Stat. § 66.0509(1m)(d)2 by appointing Douglas Witte as IHO presiding over the hearing on Plaintiffs' grievances due to Witte's bias.
- D. Declaring that Defendants' requirement that employees cite a violated provision of the Employee Handbook in order to state a workplace safety grievance violates Wis. Stat. § 66.0509(1m).
- E. Ordering Defendants to appoint an IHO to hear Plaintiffs' grievances who meets the requisite standards of impartiality.
- F. Ordering Defendants to process Plaintiffs' workplace safety grievances regardless of whether they state a violation of the Employee Handbook.

G. Awarding Plaintiffs' costs of this litigation; and

H. Awarding such other and further relief as the Court deems just and equitable.

Dated April 27, 2023

Electronically signed by: *Rebecca Ferber Osborn*

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