

STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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MILWAUKEE TYPOGRAPHICAL UNION		:	
NO. 23,		:	
	Complainant,	:	Case I
		:	No. 16040 Ce-1445
	vs.	:	Decision No. 11310-A
		:	
NORTH SHORE PUBLISHING COMPANY,		:	
	Respondent.	:	
		:	
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Appearances:

Goldberg, Previant & Uelmen, Attorneys at Law, by Mr. Thomas P. Krukowski, appearing on behalf of the Complainant.  
Binder, Zirbel & Howard, Attorneys at Law, by Mr. James G. Howard, appearing specially on behalf of the Respondent.

ORDER DENYING MOTION TO DISMISS AND HOLDING PROCEEDING IN ABEYANCE

The above-named Complainant having filed a Complaint of unfair labor practices with the Wisconsin Employment Relations Commission on September 1, 1972; and the Commission having appointed Marshall L. Gratz as Examiner with respect to said Complaint; and the Examiner, upon notice to the parties, having conducted a hearing on the matter on October 13, 1972; and during the course of said hearing, Respondent, by its Counsel, having filed a Motion requesting the Examiner to enter an Order dismissing the Complaint on the ground that the Commission lacked jurisdiction of the subject matter of the Complaint for the reason that a court of record was exercising its plenary jurisdiction over a criminal prosecution concerning the same conduct as is alleged in the Complaint; and the Examiner having deferred ruling on the Motion; and the Complainant having thereafter presented its case-in-chief; and Respondent having declined throughout the hearing to cross-examine Complainant's witnesses or to present a case-in-chief; and Respondent having requested preservation of its right to recall Complainant's witnesses adversely and to present a case-in-chief in the event that the Examiner finds that the Commission has jurisdiction of the subject matter of the Complaint; and the Examiner having

considered the Complaint and Respondent's Motion and the criminal Summons and Complaint submitted in support of said Motion and the arguments of Counsel, and being fully advised in the premises and being satisfied that the Commission does have jurisdiction of the subject matter contained in the Complaint; and being further satisfied that the instant proceeding should be held in abeyance in deference to a court of record adjudication of certain issues essential to the determination of the instant case, which court of record adjudication is expected within a reasonable period of time; and being further satisfied that the Respondent's Motion to Dismiss should be denied;

NOW, THEREFORE, it is

ORDERED

That the Motion to Dismiss the Complaint at this time be, and the same hereby is, denied:

IT IS FURTHER ORDERED that the instant proceeding be, and the same hereby is, held in abeyance either until (1) the County Court, Misdemeanor Branch, County of Milwaukee, finally adjudicates the issues now pending before it which issues are in common with those raised by the instant Complaint, or (2) until the Examiner is shown that the aforementioned Misdemeanor Branch adjudication will not be forthcoming within a reasonable period of time, whichever is earlier; either party may, at that time, request the opportunity to submit further pleadings or to present additional evidence or argument prior to the Examiner's issuance of Findings, Conclusions and Orders.

Dated at Milwaukee, Wisconsin, this 26 day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz  
Marshall L. Gratz, Examiner

STATE OF WISCONSIN

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MEMORANDUM ACCOMPANYING ORDER DENYING MOTION TO DISMISS AND HOLDING PROCEEDING IN ABEYANCE

BACKGROUND

The Complaint, filed on September 21, 1972, alleges that Respondent committed unfair labor practices within the meaning of Section 111.06 (1)(1) of the Wisconsin Employment Peace Act <sup>1/</sup> on the ground that Respondent allegedly committed a crime or misdemeanor (to wit: engaging in conduct violative of Section 103.43 of the Wisconsin Statutes <sup>2/</sup>) in connection with a controversy as to employment relations. Respondent filed no written answer.

Pursuant to notice, hearing was held on the matter on October 13, 1972, Marshall L. Gratz, Examiner, being present as were representatives

<sup>1/</sup> That Section provides that it is an unfair labor practice for an employer ". . . To commit any crime or misdemeanor in connection with any controversy as to employment relations."

<sup>2/</sup> Section 103.43(2), Wis. Stats., provides that it is a misdemeanor to violate any of the provisions of Sec. 103.43(1). Section 103.43(1) provides, inter alia, as follows:

"It shall be unlawful to . . . attempt to influence, induce [or] persuade . . . workmen . . . to accept employment in this state . . . through or by means of . . . failure to state in any advertisement . . . for employment that there is a strike or lockout at the place of the proposed employment when in fact such strike or lockout then actually exists in such employment at such place."

and Counsel for both the Complainant and Respondent. At the outset of said hearing, Respondent indicated an intent to appear only "specially" and by its Counsel moved on the record that the Examiner dismiss the Complaint on account of the Commission's lack of jurisdiction. In support of its Motion, Respondent submitted a three-page document purporting to be a criminal Summons and Complaint sworn out on September 29, 1972 against "North Shore Publishing Co., E. J. Polka, President" by Robert McGarry, President of Complainant, charging the aforementioned Defendant with violations of Section 103.43 3/ and alleging essentially the same conduct as is alleged in the instant Complaint before the Commission.

#### POSITIONS OF THE PARTIES

Counsel for Respondent argues as follows:

1) that the Complaint and the aforementioned criminal Summons and Complaint contained essentially the same allegations; that by its issuance of said Summons and Complaint, the County Court, Misdemeanor Branch, County of Milwaukee 4/ has taken jurisdiction of the subject matter of the Complaint; and that the Legislature must have intended that once a court of record's jurisdiction is invoked on the same subject matter as is contained in a Complaint before the Commission, the Commission must lose jurisdiction pending the court's disposition of the case.

2) that Section 111.07(1) permits the Complainant to elect to pursue either a criminal remedy or an unfair labor practice remedy for the alleged conduct but not both.

3) that Section 111.07(2)(a) permits only one complaint to be filed and that therefore the swearing out of a criminal complaint by the President of Complainant forecloses the Complainant's right to process a second Complaint before the Commission.

The Complainant takes the position that the Commission has independent jurisdiction to determine whether an unfair labor practice has been committed notwithstanding the issuance of a criminal Summons and Complaint in the matter. The Complainant also notes that

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3/ The criminal Complaint erroneously cited the section number in question as "103.143".

4/ Hereinafter referred to as the Misdemeanor Branch.

the County Court would order a criminal remedy (e.g., a fine) whereas the Commission would be asked to issue a cease-and-desist order and other noncriminal remedies.

#### DISCUSSION

Sections 111.06 and 111.07 of the Wisconsin Employment Peace Act grant to the Wisconsin Employment Relations Commission jurisdiction to determine unfair labor practices such as those alleged in the instant Complaint. For the reasons stated hereinafter the Examiner concludes that neither the exercise of jurisdiction by the Misdemeanor Branch over conduct alleged in the instant Complaint, nor the fact that the instant Complainant's President swore out a criminal Complaint alleging the same conduct as is complained of in the instant Complaint deprives the Commission of that jurisdiction. Each of the Respondent's arguments is discussed hereinafter.

Respondent argues that on general principles, the exercise of jurisdiction by a court of record over a given subject matter must be deferred to by an administrative and only quasi-judicial tribunal such as the Commission.

With that argument, the Examiner cannot agree. The instant Complaint alleges conduct for which the Legislature has seen fit to provide two sanctions--criminal sanctions and Commission-imposed sanctions for unfair labor practices including cease-and-desist orders, the posting of notices, etc. If the Legislature had considered the criminal sanctions as administered by courts of record sufficient to prevent the commission of such conduct in connection with controversies involving employment relations, it would not have promulgated 111.06(1)(1) at all. Moreover, in granting the Commission jurisdiction to determine and remedy unfair labor practices including the 111.06(1)(1) variety, the Legislature acted pursuant to an expressed intent ". . . to provide a convenient [and] expeditious . . . tribunal . . ." for that purpose. <sup>5/</sup> Thus, the Commission is charged by the Legislature with the responsibility of processing complaints of unfair labor practice in an expeditious fashion.

The exercise of jurisdiction by a court of record over the criminal prosecution of the same conduct in no way lessens the responsibility of the Commission to expeditiously provide a remedy for an alleged unfair labor practice. Furthermore, in the instant case, in order to conclude that the Respondent violated 111.06(1)(1), the

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<sup>5/</sup> Sec. 111.01(4) of the Wisconsin Employment Peace Act.

Commission would have to find both that the Respondent's conduct constituted a crime or misdemeanor and that the Respondent committed such crime or misdemeanor ". . . in connection with any controversy as to employment relations." The Misdemeanor Branch would not be called upon to determine the latter issue, and that tribunal would surely not be expected to render its decision with an overall view to serving the purposes of the Wisconsin Employment Peace Act. Thus, the issues for adjudication by the respective tribunals would not be identical.

For the foregoing reasons, the Examiner concludes that the Misdemeanor Branch's exercise of jurisdiction over the same conduct as is alleged in the instant Complaint before the Commission does not oust the Commission of jurisdiction of that subject matter. <sup>6/</sup>

The Respondent also argues that Section 111.07(1) precludes Complainant from simultaneously seeking both criminal sanctions and an unfair labor practice remedy with respect to the same alleged conduct. The provision in question reads as follows:

"111.07 Prevention of unfair labor practices. (1) Any controversy concerning unfair labor practices may be submitted to the commission in the manner and with the effect provided in this subchapter, but nothing herein shall prevent the pursuit of legal or equitable relief in courts of competent jurisdiction."

The Examiner concludes that the proviso beginning ". . . nothing herein . . ." was intended by the Legislature to make clear only that Commission remedies need not be exhausted prior to pursuit of certain judicial relief. The Examiner does not conclude that Section 111.07(1) was intended to preclude simultaneous criminal and unfair labor practice proceedings. Such a conclusion is not warranted by the language of the provision nor would such a finding serve the underlying purposes of the Wisconsin Employment Peace Act.

The Respondent also argues that Section 111.07(2)(a) prevents the Complainant from processing a complaint of unfair labor practice once it swears out a criminal summons and complaint concerning the same alleged conduct. The pertinent statutory language reads as follows:

"(2)(a) Upon the filing with the commission by any party in interest of a complaint in writing, on a form provided by the commission, charging any person with having engaged in any specific unfair labor practice, it shall mail a copy of

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<sup>6/</sup> The Examiner does not intend to assert, however, that a Commission determination on the issue of whether a crime or misdemeanor was committed would bind the Misdemeanor Branch in its deliberations as to a criminal charge alleging the same conduct.

such complaint to all other parties in interest. . . . Only one such complaint shall issue against a person with respect to a single controversy, but any such complaint may be amended in the discretion of the commission at any time prior to the issuance of a final order based thereon. . . ."

The Examiner rejects this argument for three reasons. First, it is noted that the Complaint before the Commission was filed prior in time to the swearing out of the criminal Complaint. Second, the words "such complaint" as used in subsection (2)(a) clearly refer only to those complaints brought before the Wisconsin Employment Relations Commission. The quoted portion of subsection (2)(a) is construed by the Examiner to be a procedural provision intended by the Legislature only to regularize pleadings before the Commission. Third, it is clear that an unfair labor practice complaint can be filed after the successful prosecution of a criminal complaint, for to hold otherwise would make Section 111.06(1)(1) substantially ineffectual. Since the filing of such an unfair labor practice complaint would constitute a "second" complaint under Respondent's construction of subsection (2)(a), Respondent's construction must be in error.

Notwithstanding the conclusions reached above, the Examiner believes that the Legislative policies expressed in 111.01(4) would be best served by holding the instant proceeding in abeyance in anticipation of an expeditious judicial action on the issue of whether the alleged conduct constitutes a "crime or misdemeanor". That subchapter speaks not only in terms of providing a convenient and expeditious tribunal for the adjudication of unfair labor practice complaints, but also of bringing the "processes of justice" to bear upon alleged wrongdoing in employment relations. <sup>7/</sup> While the most expeditious means of adjudication of the instant Complaint would be by an immediate Commission determination of the "crime or misdemeanor" issue, the provision of justice to the Respondent would call for deferring to the judgment and expertise of the Misdemeanor Branch as to

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<sup>7/</sup> The section reads as follows:

"(4) It is the policy of the state, in order to preserve and promote the interests of the public, the employe, and the employer alike, to establish standards of fair conduct in employment relations and to provide a convenient, expeditious and impartial tribunal by which these interests may have their respective rights and obligations adjudicated. While limiting individual and group rights of aggression and defense, the state substitutes processes of justice for the more primitive methods of trial by combat."

that issue. Day in and day out, that court interprets and applies various criminal proscriptions and conducts its proceedings in accordance with certain procedures peculiar to the criminal courts. Furthermore, it is charged with uniform dispensation of justice in the determination of whether crimes or misdemeanors have been committed as well as in determining appropriate sanctions for proven offenders.

In balancing the concerns for an expeditious processing of Complainant's Complaint against the Respondent's interest in obtaining the most just adjudication of its case, the Examiner concludes that the instant proceeding should be held in abeyance at this time. All indications from the record suggest that the issue of "crime or misdemeanor" will be adjudicated by the Misdemeanor Branch on October 27, 1972 or shortly thereafter. To delay the instant proceeding for a reasonable period of time in anticipation of a decision by the Misdemeanor Branch is deemed by the Examiner to be an appropriate service of the purposes underlying Chapter 111. However, in the event that the Examiner is shown (by way of Motion) that the Misdemeanor Branch will not adjudicate that issue within a reasonable period of time, the interest in providing an expeditious determination of a Complaint of unfair labor practices will become predominant, and the Examiner will thereupon proceed in an appropriate manner to a determination of the issues presented.

Dated at Milwaukee, Wisconsin, this 26 day of October, 1972.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Marshall L. Gratz  
Marshall L. Gratz, Examiner