STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

STATE OF WISCONSIN (WISCONSIN DEPARTMENT OF ADMINISTRATION FOR EMPLOYING AGENCY, UNIVERSITY OF WISCONSIN-MILWAUKEE),

Petitioner,

v.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION,

Respondent.

139-212

Decision No. 11457

Before: Hon. W. L. Jackman, Judge

Hearing on Respondent's Motion to Dismiss: August 2, 1973
Appearances: Petitioner by John F. Kitzke
Respondent by Charles Hoornstra

The proceeding began with a complaint by an employee of petitioner (employer) to respondent charging that the employee had been discharged from his employment in violation of the collective bargaining agreement of the employer with the union and also complaining that the union had failed in its duty of fair representation. Both the employer and the union denied the accusations. Hearing was had January 30, 1973. At the hearing testimony was heard on the issue of union representation after which the union and employer both moved to dismiss. The hearing officer did not grant the motion but reserved the question of whether he would take testimony on the discharge before determining the case. Shortly thereafter the employer made a motion for summary judgment, but the hearing officer ordered a new hearing and held petitioner's motions were premature. Petitioner filed a petition for review of the order refusing to dismiss with the Commission, which held it was premature, and petitioner appealed to the Commission from the hearing officer's denial of the motion for summary judgment.

The petition in this court for review asks us to review the order of the Commission dated March 27, 1973, holding the motion to dismiss was premature and to review the Commission's denial of the appeal from the hearing officer's denial of the motion for summary judgment. We will consider the denial of summary judgment first.

We have never before heard of a motion for summary judgment in an administrative hearing. Such a motion was unknown to the common law and is purely statutory. Our statute limits its use to civil actions and special proceedings. Sec. 270.635. Civil actions and special proceedings are remedies in courts. Sec. 260.02. The denial of the motion for summary judgment was certainly proper when no such procedure is known to the administrative law of Wisconsin.

Denial of the motion to dismiss. Petitioner takes the position that denial of this motion as premature denies to the petitioner the defense of failure of the employee to exhaust administrative remedies and destroys the arbitration machinery established in the collective bargaining agreement with the union. Neither the hearing officer nor the Commission did anything but say that the motion was premature and that the hearing officer had the discretion to take all of the evidence on all of the issues before reaching a decision disposing of the case. The decision of the hearing officer to take all of the evidence before ruling may very well have prolonged the hearing somewhat, but at the same time having a complete record permitted both the Commission and reviewing court to have a complete record if they should find that a

dismissal on the issue raised by the motion was improper. This in effect follows the philosophy of David v. Shille, 12 Wis 2d 482, 490, and seems to us to be in accordance with a reasonable discretion to be exercised by the hearing officer in building a record, so that all of the facts are in the record and there is no likelihood that the case might be returned for further hearings after appeal and review. This tends to the more prompt disposition of cases. Nothing in the record before us indicates that petitioner has been in any way foreclosed in its contention that the employee failed to exhaust his remedies and it might well have been that, had petitioner permitted the matter to continue as the hearing officer had planned, it would now be concluded. It also seems to us, on the merits of the case, that it would be difficult, if not impossible, for the hearing officer to determine whether the union had properly represented the employee to investigate the merits of the discharge. If the employee's case had no real merit, and the union so determined, the union might not be faulted for not pursuing the matter further. So the merits are, as the hearing officer decided, intertwined with the merits of the issue of discharge.

The only decision there has been in this case is that of the hearing officer to make a complete record. No one has decided the issues before the administrative tribunal or foreclosed any defenses or estopped petitioner. We are of the opinion that there has been no administrative decision, findings of fact or conclusions of law and petitioner's legal rights, duties or privileges have not been affected in any way by any act or omission of the administrative agency. Secs. 227.13, 227.15. In the absence of a "decision" there is nothing for this court to review as the disposition of motions and procedural orders which do not determine or prevent determination of the issues in an administrative proceeding are not decisions which permit judicial review before the final decision or termination of the case before the administrative agency. Wis. Telephone Co. v. Wis. E.R.B., 253 Wis 584. Challenge to the rulings of the agency on motions is properly made only after final decision by the agency. Pasch v. Dept. of Revenue, 58 Wis 2d 346. Thus petitioner is not affected or aggrieved by a preliminary order that does not foreclose decision on the merits. The determination that a motion to dismiss was premature, as in the case at bar, is not a denial of the motion in the sense that it determines that the motion should or should not be granted. It is merely an invitation to review it at a later time, so that in no sense does it do anything but postpone a ruling on the motion. Petitioner has not been "aggrieved". Sec. 227.16; Pasch v. Dept. of Revenue, 58 Wis 2d 346.

For the reasons above stated we must therefore grant repondent's motion to dismiss.

Petitioner would have us in the alternative enter declaratory judgment declaring the proper procedure to be followed in a proceeding before the agency. Petitioner would have us declare: (1) that a charge of unfair labor practices must be dismissed if there is a failure of the employee to allege and prove that the employer prevented the employee from using the contractual grievance procedure and to declare: (2) that the Commission must litigate and decide the issue of unfair representation before a hearing on the merits of the grievance charge.

Chapter 227 concerning administrative procedure recognized declaratory judgments as relief only for determination of the validity of administrative rules, which the case at bar does not involve. The declarations which petitioner seeks involve the procedural question of whether the agency must have split hearings and decisions on the issues in this and similar cases and a decision as to what the moving party

before the agency must prove. What petitioner, in substance, wants us to do is tell the agency that it must decide the issue of unfair representation before it hears the merits and to tell the agency how it must decide this case. The very matters which petitioner wishes us to decide were before the agency when the proceedings were interrupted by the petition for review. A petition for review of administrative decisions confers limited jurisdiction upon the court. Sec. 227.20. It does not permit giving advice or declaring rights not involved in the review. In addition we do not have before us as parties to this action the employee or the union whose rights, duties and privileges are involved in the matters in which petitioner seeks declarations. Lozoff v. Kaiserzhut, 11 Wis 2d 485. The declarations which petitioner seeks would not terminate the controversy before the agency and would be only advisory. American Medical Services, Inc. v. Mut. Fed. S & L Ass'n., 52 Wis 2d 198.

All of the issues in this case will be decided by the state agency. If the agency dismisses the claims of the employee, petitioner can have no complaint as a basis for review. If it finds for the employee, the court can review it on the whole record and not piecemeal.

We are of the opinion that no real purpose would be served by the declaration. Even if we believed we had the authority in this proceeding to give a declaration, we would exercise our discretion to decline to enter a declaratory judgment.

For the reasons above set forth, it is

ORDERED: That the motion of respondent to dismiss the above entitled proceeding is granted and the above entitled proceeding and the petition therein are dismissed.

It is further ORDERED: That on expiration of the time for appeal, if no appeal is taken from the foregoing order, the Clerk of said court shall remit the record to the respondent for further proceedings in due course.

Dated August 10, 1973

BY THE COURT:

W. L. Jackman /s/
Judge