STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

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| RACINE EDUCATION ASSOCIATION,<br><br>Complainant,<br><br>vs.<br><br>UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, WISCONSIN,<br><br>Respondent. | Case XLIII<br>No. 22205 MP-797<br>Decision No. 15915-B |

ORDERS ON MOTIONS

On the basis of the record and file,

IT IS ORDERED:

1. Respondent's November 22, 1977, motion to dismiss the complaint and alternative motion for judgment on the pleadings are denied.

2. Complainant's December 13, 1977, motion for judgment on the pleadings is denied.

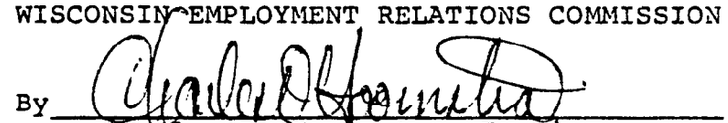
3. Complainant's December 13, 1977, motion to amend complaint is granted.

4. Respondent's December 14, 1977, motion that paragraphs 7 and 8 of the amended complaint be made more definite and certain is granted.

5. The exercise of the commission's jurisdiction over paragraph 9 of the amended complaint is temporarily stayed pending receipt of further information of an alleged pending circuit court action involving the same matter.

Dated at Madison, Wisconsin this 15th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By 
Charles D. Hoornstra, Examiner

UNIFIED SCHOOL DISTRICT NO. 1 OF RACINE COUNTY, XLIII, Decision No. 15915-B

MEMORANDUM ACCOMPANYING ORDERS ON MOTIONS

Discussion of Respondent's Motions to Dismiss or for Judgment on the Pleadings

Before the examiner is the respondent employer's motion to dismiss or, alternatively, for judgment on the pleadings.

The complaint in paragraph 6 alleges that on or about October 7, 1977, Thatcher Peterson, the respondent's director of employe relations, a supervisory agent of the employer,

> ". . . instructed all principals and administrators . . . to interfere with the rights of employees guaranteed by sec. 111.70 in that he counseled principals and other supervisory administrators to advise their subordinate employees . . . concerning ways to withdraw from membership, to further counsel such employees with respect to the Employer's wishes and desires concerning procedures such employees might withdraw from the Racine Education Association, and did otherwise instruct principals and other supervisory administrators in methods and techniques to interfere with the employees' free exercise of rights guaranteed by sec. 111.70 with regard to membership in and support of labor organizations. (A copy of said Memorandum, dated October 7, 1977, . . . is attached hereto, marked Exhibit A, and incorporated herein by reference.)"

An attachment to the complaint purports to be a memorandum from Mr. Peterson to all principals and administrators. The subject is identified as "Your questions about REA dues." The body of that memorandum states:

> "In the District's view, any teacher who told PEA and Payroll by August 1, 1977, that he or she resigned from REA is obligated to pay only the $75 service fee (assuming they were REA members on 16 March 1977).
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> "Starting last May or so, Mr. Ennis sprung on us for the first time the argument that the language on the $75 service fee--which they resisted at great length in negotiation--is really meaningless on the theory an REA member cannot resign before August 31 of any year.
>
> "If any teacher has asked you about this, you should tell them it is the District's view that such teachers are obligated to pay REA only $75.
>
> "In other words, teachers who resigned before 1 August 1977 should do nothing at this time. (If they sign a dues deduction form, the District will be obligated to deduct dues!)
>
> "When the REA sends over a list for dues deduction, the District will review it and refuse to deduct money from any teacher our records show resigned. We shall notify PEA and the individuals involved.
>
> "We have told REA that any $75 service fee teacher, who wants the District to make salary deductions of the service fee in installments, will have to sign a specific authorization form to that effect. The REA is looking at a form we drafted. We expect to hear from it.

"New teachers who do not join REA will have 'an amount equivalent to dues' automatically deducted from their salaries in installments.

"Keep in mind the District does not care whether teachers join or do not join REA. As an employer, the District may not discriminate for or against a teacher because he or she is--or is not--a member.

"By law, the REA is not supposed to discriminate on the basis of membership or non-membership."

The complaint alleges that the foregoing conduct violates sec. 111.70(3)(a)1 and 2, MERA. The answer admits the pleaded facts.

Power of commission to grant a motion to dismiss or judgment on the pleadings.

Section 111.70(4)(a), Stats., provides that sec. 111.07, Stats., "shall govern procedure." 1/ Section 111.71(1), Stats., empowers the commission to adopt reasonable rules "relative to the exercise of its powers and authority." Section 111.07 itself does not empower the commission to grant motions to dismiss or for judgment on the pleadings. ERB sec. 2.07, however, expressly contemplates motions "made previous" to a hearing. ERB sec. 12.06(1) requires the examiner to make findings of fact, conclusions of law and an order "[a]fter the close of the hearing, or upon granting a motion for dismissal of a complaint." ERB sec. 12.04(1) requies that "[h]earings shall be limited . . . to the litigation of . . . genuine issues of fact or law."

Accordingly, an examiner has the power to grant a motion to dismiss a complaint, and thereby deny a hearing to a complainant, if the complaint fails to raise a genuine issue of fact or law. Because of the drastic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief.

The respondent's alternative motion for judgment on the pleadings appears to have been precautionary in the event the joinder of issue requires the conclusion that a motion to dismiss is inappropriate. Since the commission's rules do not prevent a motion to dismiss after an answer has been filed, and since a motion for judgment on the pleadings ordinarily is a plaintiff's motion, said motion itself essentially is in the nature of a motion to dismiss.

Analysis of the complaint.

Respondent argues that the complaint rests on the contents of the Peterson memorandum and that the above-quoted portion of the complaint simply describes that memorandum in conclusory terms. Respondent particularly points to the use of the word "said."

The examiner disagrees. Although the complaint is susceptible to the interpretation respondent places on it, and it may turn out that the Peterson memorandum is the only evidence complainant has, the word "said" can be construed as confined only to the instruction referred to in line one of the complaint as quoted above. However, the complaint also alleges that the respondent "otherwise" instructed

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1/ The incorporation relates to remedies, not just procedure. See WERC v. Evansville, 69 Wis. 2d 140, 158, 230 N.W. 2d 688 (1975).

principals and supervisors in methods and techniques to interfere with employe rights.

Accordingly, construing the complaint most favorably to the complainant, it alleges:

1. The respondent, by the Peterson memorandum, instructed supervisory personnel to interfere with employe rights by advising them on ways to withdraw from membership in complainant association.

2. The respondent, other than by the Peterson memorandum, instructed supervisory personnel to interfere with employe rights by advising them on ways to withdraw from membership in complainant association.

3. The respondent, other than by the Peterson memorandum, and other than by instructing supervisory personnel to advise employes on ways to withdraw from membership in complainant association, has interfered with employe rights respecting membership in and support of labor organizations.

Analysis of the Peterson memorandum.

The memorandum on its face can be summarized as stating the following: (1) a teacher is obliged to pay a $75 service fee if (a) that teacher was a member of complainant association on March 16, 1977, and (b) that teacher gave notice to complainant and respondent's payroll department by August 1, 1977, of his/her resignation from complainant association; (2) the association contends that no teacher can resign from it prior to August 31 of any year and, therefore, that the negotiated language is meaningless; (3) if a teacher asks about this matter, the supervisory personnel are to advise the teacher that it is respondent's view that the teacher was obliged to pay only $75; (4) a teacher who resigned before August 1 should do nothing; (5) respondent is obligated to deduct such teachers' dues if they sign a dues deduction form; (6) otherwise respondent will not deduct the dues of teachers who resigned and complainant and the teacher will be notified; (7) respondent has told complainant that the $75 will be deducted from salaries in installments if the teacher signs an appropriate authorization, and complainant is reviewing a draft form; (8) new teachers will have an amount equivalent to dues automatically deducted from their salaries; and (9) respondent does not care whether teachers join or do not join complainant.

One construction of this memorandum is that Peterson was attempting to construe a collective bargaining agreement. The examiner hereby takes administrative notice 2/ of other administrative hearings involving these same parties, in which he sits as examiner, and which involve the issue as to what exhibit(s) in those proceedings correctly state the collective bargaining agreement reached on or after March 16, 1977, and, the issue whether either of the parties wrongfully refused to execute the same. 3/ The precise matter hereby noticed is that in those proceedings and exhibits the parties have no dispute that the following language was intended to be incorporated into a collective bargaining agreement:

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2/ Pursuant to sec. 227.08(2), Stats., the parties hereby are given five (5) days from the date of this decision to request an opportunity to offer countervailing evidence to the matter hereby noticed.

3/ Cases XLI and XLII.

"ARTICLE XXI
"MISCELLANEOUS

"* * *.

"2.a. Payroll deductions of professional dues and other items concerning individual teacher welfare, i.e., Educators' Credit Union and Savings Bonds, shall be accomplished by a withholding plan mutually acceptable to the Business Office and the Association.

"b. Any teacher who is not a member of the Association at the time this Agreement is ratified shall not be obligated either to join the Association or to pay any service fee to the Association.

"c. Any teacher who is a member of the Association as of August 1, 1977, must maintain his/her membership in the Association for the term of the Agreement.

"d. Any teacher who was a member at the time this Agreement is ratified and who is not a member after August 1, 1977, shall pay a service fee of seventy-five (75) dollars per school year.

"e. Any teacher whose employment commences on or after August 25, 1977, shall, as a condition of employment, be required either to join the Association or pay an amount equivalent to the Association's dues within thirty (30) days of the date his/her employment commences.

"* * *."

A second construction is that Peterson, rather than attempting to implement the terms of a negotiated agreement, unilaterally established terms of employment.

A third construction is that the memorandum instructs supervisors to interfere by advising teachers with respect to internal association matters, i.e., that, because of or in spite of contractual obligations, teachers were subject to no association obligations in respect to the association's internal rules as to (a) the date of resignation, (b) the duty to pay $75, and (c) the responsibility for taking any action at this time.

On the face of the documents here described, the first construction is eminently more reasonable. However, such a conclusion requires the drawing of inferences from evidence, which is inappropriate on a motion to dismiss. Conceivably at hearing the complainant could prove any one of the three constructions.

Consequently, the motion to dismiss must be assessed against each of the three possible constructions of the complaint and against each of the three possible constructions of the Peterson memorandum.

The alleged 111.70(3)(a)2 violation.

Complainant alleges a violation of sec. 111.70(3)(a)2, MEPA, which makes it a prohibited practice for respondent:

> "To initiate, create, dominate or interfere with the formation or administration of any labor or employe organization or contribute financial support to it. . . ."

The only words of this statute possibly having application to this case are "dominate or interfere with the . . . administration" of the complainant association.

Another examiner of this commission, with pro forma commission affirmance, 4/ has said domination contemplates "active involvement in creating or supporting a labor organization." The examiner cited no authority for that proposition. The general rule under the NLRA is that domination requires such employer control over the operation or formation of the union as to constitute it a mere tool of the employer, rather than the freely chosen representative of the employes, and that actual rather than potential control must be shown. 5/

Under neither test could the complainant prevail. Whether or not the issuance of Peterson's memorandum constitutes "active involvement," there is no way it or any other alleged conduct would create or support a labor organization. Further, nothing alleged would tend to show that complainant or any other labor organization is a mere tool of respondent, rather than the teachers' freely chosen representative, or that such control is actual rather than potential.

This leaves the question whether complainant might be able to prove up interference with the administration of the complainant association.

The commission has held that the refusal to bargain with a union because it was represented by a certain person violates sec. 111.06(1)(b), Stats., 6/ which reads substantially like sec. 111.70(3)(a)2, MERA. It has held that a supervisor's membership in a union's policy-making body violates sec. 111.70(3)(a)2. 7/ The commission also has held that a discriminatory discharge of a steward constitutes violation of sec. 111.06(1)(b), Stats. 8/ None of these commission decisions sets forth a rationale or test for violation of the duty not to interfere with the administration of a union.

Reference to the federal law reveals that interference with the administration of a union must be understood as in the nature of, but less than, employer domination of a union. This difference is reflected in the NLRB's remedial policy: if a union is dominated, the remedy is to disestablish the union; if, on the other hand, the employer has not dominated but has interfered with or given support to the union, the remedy is to withhold recognition of the union pending an election and certification. 9/ As stated by a learned text: 10/

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4/ Lisbon and Pewaukee Joint School District No. 2, 14691-A, B (6/76), p. 9.

5/ See Hertzka & Knowles v. NLRB (9th Cir. 1974), 503 F.2d 625, 87 LRRM 2503, 2507; Duquesne University (1972), 198 NLRB No. 117, 81 LRRM 1091; Chicago Rawhide Mfg. Co. v. NLRB (7th Cir. 1955), 221 F.2d 165, 35 LRRM 2665; and Coamo Knitting Mills, Inc. (1964), 150 NLRB No. 35, 58 LRRM 1116, 1117.

6/ A.L. Shafton and Company, 2041 (3/49).

7/ Professional Policemen's Protective Association of Milwaukee, 12448-A (10/74).

8/ St. Joseph's Hospital, 7030-A (1/66).

9/ Carpenter Steel, 76 NLRB No. 104, 21 LRRM 1232 (1948); Jack Smith Beverages, Inc., 94 NLRB No. 210, 28 LRRM 1199 (1951).

10/ The Developing Labor Law (BNA 1971), p. 138.

"This type of activity goes beyond interfering with the rights of individual employes in violation of Section 8(a)(1); it is aimed at the labor organization as an entity. It differs from domination in that control is not so great that the organization is subjugated to the employer's will."

Since the essence of domination is such employer control that the union is a mere tool of the employer, interference with the administration of the union differs from domination only in the degree of control. In each case, the offensive conduct threatens the independence of the union as an entity devoted to the employes' interests as opposed to the employer's interest.

With this understanding of the nature of interference with the administration of a union, then, it is clear that complainant in no way could prevail. Nothing in the Peterson memorandum or in the complaint could ultimately support a finding that the respondent had taken some control over the complainant association as an entity, as by the control of its officers or by-laws, etc., as to doubt that complainant enjoys the voluntary support of the persons it represents or that respondent asserts such control as to impair complainant's independence as the employes' chosen representative.

Therefore, the complaint states no violation of sec. 111.70(3)(a)2, MERA.

Allegation of violation of sec. 111.70(3)(a)1.

Discussion of elements of the violation.

The complaint alleges a violation of sec. 111.70(3)(a)1, MERA, which makes it a prohibited practice for respondent:

"To interfere with, restrain or coerce municipal employes in the exercise of their rights guaranteed in sub. (2)."

Respondent argues that this is an employer free speech case. It is not that simple, however. The question is whether employer statements are coercive or otherwise an interference. 11/ The legality of an employer's conduct or statement does not hinge on whether coercion results, but on whether such conduct has a reasonable tendency to

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11/ In Ashwaubenon School District No. 1, 14474-A (10/77), the commission said, pp. 7-8:

"Just as employes have a protected right to express their opinions to their employers, so also do employers enjoy a protected right of free speech in public sector collective bargaining. * * * However, . . . employers' statements must stop short of coercion, threats or interference with employe rights . . . .

"Inaccurate employer statements, although in proper cases evidentiary of a violation of other statutes, are not themselves unlawful, since 'there are instances when an innocent misstatement of fact may be harmless or the union may have the burden of correcting a misstatement.' Rather, the test is whether by its statements the employer has violated the rights of employes, such as by interference, coercion or threats." (Footnotes omitted.)

interfere with employe rights. 12/ Employer intent to interfere is not an element, since it is the "tendency [of the conduct] to weaken or destroy the . . . right that is controlling." 13/ Even the discharge of a supervisor can constitute interference if it functions as a signal to employes which chills them from exercising their rights. 14/ Indeed, the discharge of an employe based on the mere suspicion of protected activity is violative. 15/

An employer's statement to employes of its interpretation of the collective bargaining agreement is not itself violative of MERA. 16/ An employer's statement that employes will only be out union dues if they join a union itself is not violative. 17/ Telling an employe, at least in response to that employe's request for information, that a decertification petition could be filed if supported by thirty percent of the employes and that the petition must be filed within a certain period of time does not violate MERA. 18/ Further, the "mere opposition by an employer to a union does not, in itself, constitute a prohibited practice." 19/ An employer does not violate the law by preparing and disseminating to its plant managers sample statements of resignations from the union to assist employes who feared they would be fined by working during a strike and who asked for assistance in resigning. 20/ Recommending that employes take a strike vote before striking is not violative. 21/ Helping employes to withdraw from a union is not per se violative, since the finding of a violation depends on all the facts and circumstances, 22/ and there are circumstances in which such assistance is violative as tending to interfere with their rights. 23/

First construction of the complaint.

The first construction of the complaint is that the respondent, by the Peterson memorandum, instructed supervisory personnel to interfere with employe rights by advising them on ways to withdraw from membership.

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12/ NLRB v. Illinois Tool Works, 153 F.2d 811, 17 LRRM 841 (7th Cir. 1946); Time-O-Matic, Inc. v. NLRB, 264 F.2d 96, 43 LRRM 2661 (7th Cir. 1959); Juneau County, 12593-B (1/77), p. 27.

13/ NLRB v. Burnup and Sims, Inc., 379 U.S. 21, 57 LRRM 2385 (1964).

14/ Thermo-Rite Mfg. Co., 157 NLRB No. 24, 61 LRRM 1336 (1966), Enforced, 406 F.2d 1033, 70 LRRM 2344 (6th Cir. 1969).

15/ NLRB v. System Analyzer Corp., ____F.2d ____, 73 LRRM 2784 (7th Cir. 1970).

16/ City of Green Bay, 12352-B, C and 12402-B, C (1/75).

17/ Juneau, supra, n. 12, pp. 25-26.

18/ Village of Shorewood, 11410-C (1/74) p. 7.

19/ Brown County, 9537 (3/70) p. 5.

20/ Mosher Steel Co., 220 NLRB No. 47, 90 LRRM 1459 (1975).

21/ Westinghouse Electric Corp., 232 NLRB No. 10, 96 LRRM 1216 (1977).

22/ NLRB v. Monroe Tube Co., 545 F.2d 1320, 94 LRRM 2020, 2024, 2025-6 (2nd Cir. 1976).

23/ See cases collected at CCH par. 3830.40, .4095, and .83.

- First construction of the memorandum.

The first construction of the memorandum is that it sought to implement respondent's view of the collective bargaining agreement.

The mere statement of the employer's interpretation of the collective bargaining agreement is not interference, restraint or coercion. If the interpretation is incorrect, and action is taken pursuant to that incorrect interpretation, the remedy is for violation of the contract, not interference.

Accordingly, the first construction of the complaint together with the first construction of the Peterson memorandum fails to state a claim upon which relief might be granted.

- Second construction of the memorandum.

The second construction of the memorandum is that, rather than attempting to implement the terms of a negotiated agreement, Peterson unilaterally established terms of the employment relationship.

Although unilateral action of this sort ordinarily is pleaded as a refusal to bargain, a motion to dismiss is concerned with the facts alleged, not the putative statutory violations. Further, interference derivatively follows from a refusal to bargain since such refusal interferes with the rights of organizing in order to bargain. 24/

Accordingly, the first construction of the complaint together with the second construction of the Peterson memorandum states a claim upon which relief might be granted.

- Third construction of the memorandum.

The third construction of the Peterson memorandum is that the memorandum instructs supervisors to interfere by advising teachers in respect to matters governed by internal association rules, regardless of the terms of the collective bargaining agreement, involving a resignation date, the duty to pay $75, and the responsibility for taking any action.

The management and internal affairs of a labor organization are governed by the constitution and by-laws and constitute a contract between the members of the association. 25/ Union rules, even in their enforcement, however, are subject to the duty to bargain and the collective bargaining agreement. 26/ It is a fact question whether the employer's assertion of position is a good faith interpretation of the contract or unlawful interference. 27/

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24/ City of Madison, 15095, (12/76) p. 18, n. 5.

25/ Attoe v. Madison Pro. Policemen's Asso., 79 Wis. 2d 199, 206, 255 N.W. 2d 489 (1977).

26/ See Scofield v. NLRB, 394 U.S. 423, 429, 430, 436 (1969); Carpenters Union, 145 NLRB No. 163, 55 LRRM 1219 (1964), affirmed on the point but remanded on other grounds, sub. nom. Associated Home Builders v. NLRB, 352 F.2d 745, 60 LRRM 2345 (9th Cir. 1965); Painters District Council, 186 NLRB No. 140, 75 LRRM 1465 (1970), enforced, 453 F.2d 783, 79 LRRM 2145 (2nd Cir. 1971), cert. denied, 408 U.S. 930.

27/ Consolidated Aircraft Corporation v. NLRB, 144 F.2d 785, 14 LRRM 553, 555 (9th Cir. 1944).

Thus, if Peterson's memorandum is a good faith interpretation of union obligations as affected by the collective bargaining agreement, there could be no violation. If, on the other hand, the memorandum urges advising employes on internal union matters unaffected by the collective bargaining agreement, a violation results if such advice otherwise is coercive or interference.

It is difficult to understand how a mere statement of opinion as to internal union rules could constitute a violation. Construing the complaint most favorably to complainant, however, its use of the word "interfere" could allege that the memorandum, under the facts and the circumstances, tends to chill employe rights in internal union matters. Although the memorandum is directed to supervisors, a liberal construction of the complaint, and especially its use of the word "interfere," requires assuming that complainant might be able to prove that there was interference, for example, because employes knew of the memorandum, and that the natural tendency of the language employed therein, under the facts and circumstances, is to chill employe exercise of rights. Of course, among the relevant facts is that the memorandum appears to presume that supervisors will communicate the employer's position only in response to employe inquiries and that it admonishes supervisors that respondent does not care whether employes join a union. Arriving at a conclusion, however, requires the drawing of inferences from facts, which cannot be done on a motion to dismiss.

Accordingly, the first construction of the complaint together with the third construction of the Peterson memorandum states a claim upon which relief might be granted.

Second construction of the complaint.

The second construction of the complaint is that the respondent, other than by the Peterson memorandum, instructed supervisors to interfere by advising employes on ways to withdraw from union membership.

Conceivably evidence in support of this allegation might show that Peterson instructed supervisors to advise employes as to how to withdraw from union membership, that it was done under facts and circumstances known to employes, and that the manner and circumstances under which it was done chilled employes in the exercise of their rights to join or not to join a union.

Accordingly, the second construction of the complaint states a claim upon which relief might be granted.

Third construction of the complaint.

The third construction of the complaint is that, other than by the Peterson memorandum and other than by instructing supervisors to advise employes on ways to withdraw from union membership, respondent has interfered with employe rights respecting membership in and support of labor organizations.

This allegation states a violation and will survive a motion to dismiss, although on a proper motion the respondent would be entitled to an order making the complaint more definite and certain in this respect.

Summary

The complaint fails to state a claim upon which relief might be granted under sec. 111.70(3)(a)2, MERA.

The complaint states a claim upon which relief might be granted under sec. 111.70(3)(a) 1 or 4, MERA, by the following constructions of the allegations:

1. That, by the Peterson memorandum, rather than attempting to implement the terms of a collective bargaining agreement, respondent unilaterally established terms of employment.

2. That, by the Peterson memorandum, rather than speaking to matters affected by a good faith interpretation of the collective bargaining agreement, respondent chilled employes' rights in respect to support of or withdrawal from a labor organization by issuing instructions relative to the employes' obligations as to time of resignation, dues or service fee owing, and the need to take any action, under facts and circumstances rendering such instructions coercive or an interference.

3. That, other than by the Peterson memorandum, the respondent instructed supervisors to advise employes on ways to withdraw from union membership under facts and circumstances such that said instruction interfered with the rights of employes.

4. That respondent has otherwise interfered with the rights of employes respecting membership in and support of labor organizations.

Therefore, the motion to dismiss and the alternative motion for judgment on the pleadings must be denied.

Discussion of Complainant's Motion for Judgment on the Pleadings

Although the commission rules do not expressly authorize the granting of a motion for judgment on the pleadings, arguably such a motion is proper under the rule in ERB 12.04(1) to limit hearings to genuine issues of fact and law. However, even if an answer admitted all the allegations of a complaint which shows entitlement to relief, a hearing still might be necessary to fashion appropriate relief.

It is not necessary to resolve this issue here, however, since the motion must be denied on its merits. It rests on a *per se* theory, that any communication by an employer, especially if received by employes respecting their union obligations, is interference, domination or interference with union administration. The commission decisions and other authorities cited in connection with treatment of the respondent's motion to dismiss require rejection of this *per se* theory. Whether the employer's alleged conduct is violative requires the drawing of competing inferences from the contents of the memorandum and from the facts and circumstances involved, which must be done after hearing and not on a motion for judgment on the pleadings.

Discussion of Complainant's Motion to Amend

Complainant, on December 13, 1977, the day its brief in opposition to respondent's motion to dismiss or for judgment on the pleadings was due, moved to amend its complaint. Respondent resisted, saying:

> "REA shouldn't be allowed to amend at all because so much time has passed, the matter is already set for hearing on an on-call basis for December 19, 20 or 21, 1977, and REA could have and should have amended its pleading earlier."

ERB 12.02(5)(a) provides:

> "* * * Any complainant may amend the complaint upon motion, prior to the hearing by the commission . . . ."

Without doubting that a complainant may be denied this right by egregious conduct tantamount to abuse of process, and empathizing with respondent which prepared a well thought-out brief based on the original pleading only to have complainant ask to alter its allegations on the eve of hearing, nevertheless complainant's conduct does not constitute such an egregious abuse of process as to warrant denial of a right secured by the commission's rules. Its motion to amend, therefore, is granted.

Discussion of Respondent's Motion to Make More Definite and Certain

Paragraphs 7 and 8 of the amended complaint state:

> "7. The conduct of W. Thatcher Peterson referred to in Paragraph No. 6 hereof was part of a course of conduct, both oral and written, by which the Employer has sought to interfere with the right of employees to self-organization guaranteed in sec. 111.70(2), Stats. by both demonstrating hostility to the Racine Education Association, and at the same time authorizing 'all principals and administrators' of the School District to intrude into areas of internal union membership and to discourage employees from signing dues payroll deduction forms or 'the District will be obligated to deduct dues!'
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> "8. Principals and other supervisory agents of the Employer, in accordance with the instructions of the Director of Employee Relations, did induce and encourage employees not to sign union dues check off authorizations."

The employer argued that if complainant is permitted to amend its complaint such permission should be conditioned on providing greater specificity. In a conference telephone conversation with attorneys for the parties on December 14, 1977, the examiner advised that he would grant the motion to amend and would treat the respondent's proposed condition as a motion to make more definite and certain. He further advised that he would grant the latter motion as well.

Ordinarily a period of time would be allowed the complainant to file a bill of particulars. In the conference call, however, both parties expressed willingness to proceed to the scheduled hearing on December 19, 20 and 21 in the hope that complainant could comply with the order to make more definite and certain at that time with sufficient specificity and notice to enable respondent to respond and proceed. Accordingly, the order to make more definite and certain does not contain any time limit, but the order in this respect is subject to further amendment if the parties' efforts at dispatch prove unfruitful.

Discussion of Stay of Exercise of Jurisdiction Over Paragraph 9 of the Amended Complaint.

Paragraph 9 of the amended complaint states:

> "9. The Employer and its agent, W. Thatcher Peterson, have interfered with the right of employees to self-organization in that it has sought to further weaken and undermine the economic stability of the Racine Education Association by, although obligated to do so, failing and refusing to implement the provisions of its entire fair share agreement at all times both prior to and since its October 7, 1977 memorandum."

By letter of December 13, 1977, received on December 14, 1977, respondent argued that this paragraph belongs in Case XLIV, where complainant alleges about the same thing. In the conference call on December 14, however, respondent indicated its willingness to consider withdrawing from that position in the interests of expediting disposition of the issue.

However, in its letter of December 13, received on December 14, respondent also stated:

> "I was informed today . . . that REA . . . has sued the District in the Racine Circuit Court, alleging the same breach of contract regarding fair share."

It is the commission's policy not to assert its jurisdiction over issues which also have been submitted to a court, notwithstanding the commission has primary jurisdiction. The reason is that whether to honor the commission's primary jurisdiction rests in the discretion of the court. For the commission to proceed might appear as calculated to embarrass a court or to encroach on its discretion whether to honor the primary jurisdiction doctrine. Thus, the commission's policy is borne out of respect for the courts.

Here, it has not been conclusively established that there is such a pending action or that it involves the same question submitted to the commission. We have only the respondent's attorney's statement that he has been so informed. Since there is no reason to doubt the attorney's good faith belief in the matter, it seems the better course to temporarily stay exercise of jurisdiction pending receipt of further information in respect to this matter.

Dated at Madison, Wisconsin this 15th day of December, 1977.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By Charles D. Hoornstra
Charles D. Hoornstra, Examiner